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NOTES OF INDIAN CASES

BHAGAVANTULAYYA *v.* VENKANDHORA, (1941) 1 M.L.J. 788 (F.B.).

One of the questions raised in this case was whether the principle *de minimis non curat lex*—the law does not concern itself about trifles—can be invoked in cases of tender of an amount in redemption of a mortgage, where owing to a *bona fide* mistake in calculation on the part of the mortgagor the sum tendered falls short of the amount due by a few rupees. It was not necessary for the Full Bench to give a decision on this point and in fact the matter was left open but with the observation that "it is certainly open to doubt whether it (the maxim) can properly be applied" (p. 791). There is not much direct authority on the point, English or Indian, and such judicial dicta as refer to the question are of a conflicting kind. Among the statutes, S. 38 (2) of the Indian Contract Act lays down the principle that the offer of performance must be "of the *whole* of what he (the promisor) is bound by promise to do". S. 83 of the Transfer of Property Act which confers on a mortgagor the power to deposit in Court the money due on a mortgage requires that it should be of *"the amount remaining due on the mortgage"* and S. 84 declares that it is only on the tender or deposit in Court under S. 83 of *"the amount remaining due on the mortgage"* that there will be cessation of interest. The language of these provisions is unambiguous and suggests that *prima facie* a tender will not be good where it is not of the correct amount, irrespective of the nature of the deficiency, whether it is by a few pies or by a few rupees. This conclusion is also in consonance with the spirit of the decisions which hold that the money tendered must be in the coin of the realm, *Trimbak* v. *Sakharam*[1], and that even a payment by cheque will not be a proper tender, *Jones* v. *Arthur*[2], Re. *Quebrades Co., Clarke's case*[3], *Johnston* v. *Boyes*,[4]

1. (1891) I.L.R. 16 Bom. 599.
2. (1840) 8 Dowl. P.C. 442.
3. (1873) 42 L.J.Ch. 277.
4. (1899) 2 Ch. 73.

Venkataramier v. *Gopalakrishna*[1]. The amount tendered ought to be the *precise* amount that it is due[2]. It is true that with reference to proceedings for infringement of the revenue laws, Sir W. Scott has observed: "The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *de minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle which if continued in practice, would weigh little or nothing in the public interest, it might properly be overlooked[3]". As pointed out in *Joyce* v. *Metropolitan Board of Works*[4], courts of justice do not generally take trifling and immaterial matters into account except under peculiar circumstances such as the trial of a right or where personal character is involved. For the maxim to apply there must be no question of right or personal character involved; the infringement should be slight and of a prescription inflicting a penalty on violation thereof; and condonation should weigh little or nothing in the public interest. The maxim has thus been held not to apply to the law of trespass, *Somasundaram Chetty* v. *Ramiah*[5], or so as to neglect fractions in the matter of determining majority of votes at a meeting, *Lakhmidas and Co.* v. *Sir Dorab Tata*[6]. In the case of tender of amount in redemption of mortgages the mortgagee is not bound to accept anything less than the full amount that is owing to him and he cannot be damnified by any mistake made by the mortgagor in making the tender, *Gauri Shankar* v. *Abu Jafar*[7]. The smallness of the sum involved is *per se* no reason for the application of the maxim *de minimis non curat lex*, for it very frequently happens that a very small sum may involve a very big question of principle, *Kameshwar Singh* v. *Ramjiwan Sahu*[8]. As remarked by the Allahabad High Court in a case where the tender was insufficient by Rs. 2-9-6 due to miscalculation by the pleader's clerk, "the amount of insufficiency is wholly irrelevant. Whether it was Re. 1 or Rs. 100 or Rs. 1,000 makes no difference in law[9]". In Madras, while in *Subbai Goundan* v. *Palani Goundan*[10], Sadasiva Aiyar and Moore, JJ., considered that a deficiency of 9 17/31 pies due to a *bona fide* mistake on the part of a mortgagor in making a deposit under S. 83, T. P. Act would render the deposit invalid, in a later case, *Subramania Aiyar* v. *Narayanaswami Vandayar*[11], Seshagiri Aiyar, J., alluding to the earlier decision stated: "if I were deciding that case I would have applied the maxim *de mini-*

1. (1929) I.L.R. 52 Mad. 322.
2. 7 Halsbury p. 198, S. 277.
3. *The Reward*, 2 Dod. 265.
4. 44 L.T. 811.
5. (1911) 22 M.L.J. 62; *see also* Clerk and Lindsell on Torts, 4th ed. p. 343.
6. (1927) I.L.R. 51 Bom. 247.
7. (1915) 34 I.C. 690.
8. A.I.R. 1932 Pat. 237.
9. *Jag Sah* v. *Ramachandra Prasad* (1921) 63 I.C. 563.
10. (1916) 30 M.L.J. 607.
11. (1917) 34 M.L.J. 439.

mis non curat lex". This *obiter dictum* has been approved by Venkataramana Rao, J., in a case where on the question whether a deposit under S. 83 of the T. P. Act, of Rs. 2,144-12-4 instead of the correct amount Rs. 2,144-12-10 due to a mistake in calculation will render the deposit invalid, he held that the *de minimis* rule will apply and the deficiency can be cured[1]. It is submitted that these cases really stand outside the scope of the maxim that the law will not concern itself about trifles. In these cases no mere irregularity in procedure arises nor any question of the infringement of a prescription enjoined in the public interest carrying a penalty on violation thereof, admitting a relaxation of the letter of the law where such relaxation will not affect the public interest in any appreciable degree. They are, on the other hand, cases involving private rights and obligations where the letter of the law has to rule, there being no ambiguity in the language of the statutory provisions concerned.

MIR GHULAM HUSSAIN SAHIB *v.* AYESHA BIBI, (1941) 1 M.L.J. 800 (F.B.).

This Full Bench decision holds that where a Judge certifies under Cl. 15 of the Letters Patent that a case "is a fit one for appeal," it is no function of the learned Judge to say what points are fit for appeal and that it is really for the higher appellate Court to say what are the questions it will allow to be raised. Clause 15 of the Letters Patent (Madras) merely states that an appeal shall lie from a judgment of any Division Court on second appeal "where the Judge who passed the judgment declares that "the case is a fit one for appeal." There is nothing in Cl. 15 to suggest that in granting leave the learned Judge can limit the points on which the appeal can be taken, nor is there anything prohibiting him from doing so. In fact the scope of a Letters Patent appeal has always been the subject of a conflict of judicial opinion. While some decisions take the view that in any event points not raised during the hearing of the second appeal cannot be argued in Letters Patent appeal, *Shahazadee Hazra Begum* v. *Khaja Hossein Ali Khan*[2], *Aiyanars* and *Kaniyala Swamigal Koil Devasthanam* v. *Periyakaruppa Thevan*[3], *Kapildeo Bhagwan* v. *Ali Raza*[4], there are other decisions holding that the whole matter is open, see *Shaik Mahamad Ravuthar* v. *B. I. S. N. Co.*[5] In England, it has been held by the Court of Appeal more than once that it has no jurisdiction in appeals from judgments of Division Benches of the High Court passed in the exercise of their appellate jurisdiction to hear such appeals except on the points on which leave to appeal has been given by the Divisional Courts,

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1. *Narayanaswami Nayak* v. *Ramaswami Nayak*, (1939) 1 M.L.J. 324.
2. (1869) 12 W. R. 498. 3. (1929) 30 L.W. 583.
4. (1940) I.L.R. 19 Pat. 104, *see also* I.L.R. 20 All. 258, A.I.R. 1923 Lah. 151, etc.
5. (1908) I.L.R. 32 Mad. 95, *see also* 20 C.W.N. 210, etc.

where leave has been so limited, *Jones* v. *Biernstein*[1], *Sanderson* v. *Blyth*[2]. A similar view has been taken by the Judicial Committee as to the scope of appeals to that body by special leave. Thus in *Brownlee* v. *Macmillan*[3], where an appeal was carried to the Privy Council by special leave, their Lordships declined to hear counsel on points not forming the subject of consideration in granting special leave. Lord Thankerton observed: "When special leave to appeal was granted there was no intention on the part of their Lordships who heard the application to permit argument on any point except the effect of S. 5 of the Seduction Act." The cases of special leave may stand on a different footing altogether and the nearest English analogy is that afforded by the jurisdiction exercised by the Court of Appeal in appeals from a Division Bench of the High Court exercising appellate jurisdiction. In India, on the question whether the Judge granting a certificate under Cl. 15 of the Letters Patent can limit the points open to argument in the Letters Patent appeal, conflicting tendencies are visible. In *Buthiraju* v. *Satyanarayanamurti*[4], Ananthakrishna Aiyar, J., held that the Judge giving leave to appeal from his judgment in second appeal may limit it to certain points only and in such cases the appellant will be confined to such points. In *Dass* v. *Lakhajee*[5], the Rangoon High Court has however adopted a wider view of the powers of the Bench hearing the Letters Patent appeal, namely, that the Bench will not be precluded from going into points other than those raised in the certificate. The instant decision puts the matter slightly differently in laying down that the Judge granting the certificate cannot limit in any way the points that can be raised in appeal and incidentally disapproves the view taken in *Buthiraju's case*[4].

In the matter of the Hindu Women's Rights to Property Act, 1937, (1941) 2 M.L.J. 12 (F.C.).

"A legislative measure . . . . . is intended to be administered rather than litigated upon," said Lord Wright in *Harris* v. *Associated Portland Cement Manufacturers*[6]. That this is only a counsel of perfection is nowhere more forcibly illustrated than in the case of the Hindu Women's Rights to Property Act (18 of 1937). Where previously there was a measure of uniformity there has now been introduced an element of diversity in the law applicable to the rights of succession of Hindu widows, by reason of the Opinion of the Federal Court in regard to that Act. The right of succession of Hindu widows will hereafter depend not merely on the character of the property left by the deceased, agricultural or non-agricultural, but also upon its *situs*, whether it is within

1. (1900) 1 Q.B. 100 (C.A.). 2. (1903) 2 K.B. 540 (C.A.).
3. (1940) A.C. 802 (P.C.).
4. (1930) I.L.R. 53 Mad. 406. 5. (1940) Ran.L.R. 693.
6. (1939) A.C. 89.

a Governor's Province or elsewhere in British India. How her rights of succession will react on her right to maintenance in the Governors' Provinces where a person dies leaving agricultural land as well as other property is likely to be hereafter a fruitful field of litigation.

In so far as the opinion under notice holds that the Act governs cases of devolution by survivorship also, the position is supported by authority. Though there is a difference between the rule of survivorship applicable to co-parcenary property and the rule of inheritance governing separate property, there can however be no doubt that both of them are really rules of succession. In the *Sivaganga case*[1], the Privy Council has observed: "there are two principles on which the rule of succession according to Hindu law appears to depend; the first is that which determines the right to offer the funeral oblations and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship". Again in the *Gangur case*[2], the Privy Council has remarked that the *Sivaganga case*[1], which was the foundation of the distinction between the rule of survivorship applicable to joint family property and the rule of inheritance applicable to the self-acquired or separate property of a person was authority "to support the proposition that, whether the general status of the family be joint or divided, *property which is joint will follow one and property which is separate will follow another course of succession*".

In so far however as the Opinion under notice holds that Act 18 of 1937 legislates in respect of succession to property other than agricultural land alone and that the word "property" as used in the Act should be so understood, the position is open to criticism and some of the lines of reasoning adopted by the Court fail to carry conviction. It is conceded that the Act purports to deal in quite general terms with the property of a Hindu and does not distinguish between agricultural land and other forms of property (pp. 21, 22). It is also recognised that "it may well be that the Indian Legislature if it had been able to pass the Act while it still possessed plenary powers would have desired that the better rights which it sought to give to Hindu women should extend to agricultural land as well as other property (p. 28). But it is said that because when the Act finally emerged from the second Chamber of the Legislature and received the assent of the Governor-General the powers of the Legislature became restricted it should be understood as referring only to those forms of property with respect to which the Legislature was competent to legislate, that is to say, property other than agricultural land. Even assuming the prin-

1. *Katamma Nachiar v. Vijaya Raghunatha*, (1863) 9 Moo.I.A. 539, 614.
2. *Chowdhry Chintamun Singh v. Mt. Nowlukho Kunwari*, (1875) L.R. 2 I.A. 263, 271.

ciple contained in the first part of the statement to be correct the conclusion contained at the end will not follow, for on the 14th April, 1937, the Central Legislature was certainly competent to legislate for all forms of property in certain parts of British India, namely, the Chief Commissioners' Provinces, see Ss. 100 (4), 46 and 94 of the Government of India Act, 1935. The test propounded by the Federal Court if strictly applied will mean that the term 'property' as used in the Act 18 of 1937 will cover all kinds of property in some places in British India and property other than agricultural land in other places, a position that will attribute to the Legislature an intention that the same term should mean different things in different localities.

It is true that there is a presumption that a Legislature does not intend to exceed its jurisdiction. It may be equally true that the intention of the Legislature should be ascertained in the light of its powers on the date when the Bill becomes law. The latter principle obviously cannot apply to a case like the present which is altogether anomalous. The rule may govern where the Legislature consisted of a single Chamber and its powers were curtailed before the Bill became law, whether such curtailment took place before the Bill was passed by the Chamber or not; the rule may equally apply where the Legislature consisted of more than one Chamber and its powers were cut down either after the Bill had been passed by both the Houses or before either of them had passed it. In the case of the Hindu Women's Rights to Property Bill, the intention of the Assembly which possessed plenary powers while it passed the Bill can in no sense be the same as that of the Council of State whose powers at the time of passing the Bill had been cut down. To attribute to both the Houses an identical intent in such circumstances by the application of the doctrine that the intention of the Legislature should be deduced in the light of the powers it had on the date when the measure became law is, with great respect, to carry fiction to illogical limits. In fact in a case like the present the appropriate course would have been to ask the Assembly to reconsider the measure as passed by the other House so as to secure its consent to the amendments to the scope of the original measure effected by operation of law consequent upon the restriction of the powers of the Central Legislature due to the coming into force of Part III of the Government of India Act, 1935, and the passing of the Bill by the Second Chamber under its curtailed powers. The test propounded by their Lordships will lead to startling results, if applied in similar circumstances, to a converse case. If at the time the Assembly passed the Bill it had power to deal with non-agricultural property only but by the time the measure was passed by the other House the Legislature acquired power to deal with all forms of property, can it be said that by the use of the term 'property' generally in the Bill both the Houses must be deemed to have legislated in regard to all kinds of property by the application of the doctrine that the intention

of the Legislature should be gathered from the powers it had on the date when the Bill became law?

The statement, that the Indian Legislature which was in existence immediately before the coming into force of Part III of the Government of India Act, 1935, was continued in existence after that date and was *in all respects* the same Legislature, is equally open to challenge. Burma had been separated from British India; the powers of the Central Legislature had been curtailed; its personnel had become reduced; and its territorial jurisdiction had become abridged. Under S. 2 of the Government of India Act, 1935, there was also a resumption of all powers, authorities and jurisdiction by the Crown. The Act of 1919 under which the Central Legislature had been constituted had been repealed. No doubt by virtue of S. 317 and the Ninth Schedule to the Act of 1935 such part of the Central Legislature as remained after the secession of Burma was to exercise with reference to British India the functions of the Federal Legislature during the transitional period pending the advent of Federation. Do not these factors and provisions suggest that the old Legislature had perished in the first instance and had been resurrected or recreated with different powers and territorial jurisdiction? The analogy of the effect of a resumption of an inam by Government and an immediate regrant of it to the very individual who had held it all along, as extinguishing the old tenure and as vesting the grantee with an altogether fresh title to the property, strengthens such an inference. Nor has the Federal Court considered the necessity for and the implications of such provisions as S. 292 of the Act of 1935 providing for the continuance of the existing laws, and S. 9 (1) of the Government of India (Commencement and Transitory Provisions) Order 1936 and S. 1 of the India and Burma Existing Laws Act, dealing with laws already passed but intended to take effect at a future date which might well be after the commencement of Part III of the Act of 1935. In fact the considerations bearing on the validity of the Hindu Women's Rights to Property Act mentioned in the columns of this Journal [(1940) 2 M.L.J. 63 Jour.] still remain true. In these circumstances one would wish that the Federal Court had also considered the arguments advanced on the footing that property as used in the Act covered all kinds of property and on the applicability of the doctrine of severability upon such a construction.

RAMANNA *v.* JAGANNADHA RAO, (1941) 2 M.L.J. 58 (P.C.).

The Privy Council has in this case held that coparceners who intend to remain joint do not become divided because for purposes of pretence they refer to their interests in particular properties by fractional shares. This is but a reiteration of the doctrine that

partition is the result of intention. A statement of their Lordships in *Appovier* v. *Ramasubba Aiyan*[1], had however given rise to some difficulty. The Privy Council had in that case observed: "When the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty". This statement can hardly afford scope for the contention that separation of status will result even where the agreement is sham or a mere pretence. It is not the recital but the actings and dealings with the estate which furnish a true guide to the determination of the question of jointness or otherwise, *Harkishan Singh* v. *Partap Singh*[2]. There must be clear proof that the parties *intended* that the agreement must take effect immediately, it is only then that there will be a separation in status, *Purnananthachi* v. *Gopalaswami Odayar*[3]. Where a decree was passed by consent of parties that the sons of a person by his first wife were to have a half share and his sons by his second wife including those that might be born thereafter were to have the other half, it was held that in the circumstances the decree effected no severance in status but merely embodied an arrangement to be carried into effect if and when a partition was decided upon, *Chockalingam Chettiar* v. *Muthukaruppa Chettiar*[4]. So where there is no genuine intention or *animo contrahendi* that the agreement is to effect a separation in *praesenti* a mere reference in a document by the coparceners to their fractional shares in particular properties will not extinguish their joint status.

Another question raised before the Privy Council, which if answered would have set at rest a conflict of judicial opinion on the point, as pointed out in (1941) 1 M.L.J. 14 at p. 18 N.I.C., was whether an alienation by a coparcener of his interest in the family properties would in any degree have affected his status in the family *vis a vis* the other members thereof. Their Lordships did not find it necessary to examine the contention and thus the matter still remains unsettled.

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1. (1866) 11 Moo.I.A. 75.
2. (1938) 2 M.L.J. 234 (P.C.).
3. (1936) 71 M.L.J. 554.
4. (1938) 2 M.L.J. 756.

KHANDERAO SHIVAJIRAO GAEKWAR *v.* ROMER, I.L.R. (1941) Bom. 55.

This case decides a point which should frequently come up in practice though there are not many decisions concerning the same. The question was whether the purchaser of the last out of several parcels of land into which an area had been divided, such parcel being also the lot of the greatest value, has the right to the possession of the title-deeds relating to the entire land as against his vendor who had sold the other parcels or lots to various other persons on earlier occasions and had covenanted with them individually to produce the title-deeds for their inspection whenever needed. It is well settled that title-deeds pass with the conveyance as incidental to ownership or as accessory to the estate without being named, *Lord Buckhurst* v. *Fenner*[1], *Tinniswood* v. *Pattison*[2], *Austin* v. *Croome*[3] *Rogers* v. *Hosegood*[4]. The right to the documents runs with the land, In re *Williams and Duchess of Newcastle's Contract*[5]; see also *Shri Bhawani* v. *Devrao*[6]. There is cast on the seller a duty to deliver to the purchaser all the deeds relating to the property conveyed including the documents in his power though not in his possession, Re *Duthy & Jesson*[7]. To these rules two exceptions are postulated. The first is where the vendor has retained a part of the property covered by the deeds, see *Yea Bart* v. *Field*[8]; *cf.* S. 45 (9), Law of Property Act, 1925. The second is when the property is sold in different lots, in which case the purchaser of the lot of greatest value will be entitled to the deeds. This right may however be excluded by a contract to the contrary. There can thus be a stipulation that the purchaser of the largest lot, *i.e.*, the lot of the largest area shall be entitled to the deeds, per *Sir W. Page Wood, V.C.*, in *Griffiths* v. *Hatchard*[9]. The Indian law runs on the same lines and is contained in S. 55 (3) of the Transfer of Property Act. The rule in that section takes its source from the Vendor and Purchaser Act, 1874, 37 & 38 Vic., c. 78., S. 2 and the Conveyance Act, 1881, 44 & 45 Vic., c. 41., S. 9. The first proviso to S. 55 (3) of the Transfer of Property Act corresponds to r. 5 in S. 2 of the Vendor and Purchaser Act, 1874, while the second proviso is drawn from Sugden's Vendor and Purchaser p. 434. S. 55 (3) of the Transfer of Property Act does not cover the cases where the sales of the several lots are at materially different times or where all the lots fetch an even value. According to English law, in the former case the last purchaser will be entitled to the title-deeds, In re *Lowe*: *Capel* v. *Lowe*[10]. It is

1. (1572) 1 Co. Rep. 1: 76 E.R. 1.
2. 3 C.B. 243.
3. (1842) Car. & M. 653: 174 E.R. 675.
4. (1900) 2 Ch. 388.
5. (1897) 2 Ch. 144 at 148.
6. (1887) I.L.R. 11 Bom. 485.
7. (1898) Ch. 419.
8. 2 T.R. 758.
9. (1854) 1 K. & J. 17: 69 E.R. 350.
10. (1901) 36 L.J. 73.

not clear whether that principle will rule even where the last lot is not the lot of the highest value. At any rate, in India, there seems to be no room for doubt. Having regard to the language of S. 55 (3), proviso (*b*) it is "the highest value" rule that must govern even where the lots are sold at different times. As regards the case where all the lots or parcels fetch an even value, the highest value test being futile, it is submitted that the other principle will operate, namely, that the last of the purchasers will be entitled to the possession of the title-deeds. This will be so even where the lots fetching equal prices are sold at the same time. For theory apart, in such cases there must as a matter of fact be some little interval of time separating the several transactions in view of the impossibility of achieving absolute synchrony in practice.

Regarding the effect of the personal covenants given by the vendor to the earlier purchasers in the instant decision on the operation of the aforesaid rules, the spirit as well as the letter of S. 55 (3) of the Transfer of Property Act suggest that their existence cannot be used as a lever for negativing the right of the vendee of the last lot which was also the lot of the highest value to the possession of the title-deeds, but that such vendee shall be entitled to the deeds only if he was prepared to shoulder the obligation of his vendor to the other purchasers in this respect. The Bombay High Court in arriving at that conclusion has also stated that the covenant given by the vendor to the earlier purchasers in regard to the title-deeds, may on the sale of the last lot be regarded as a covenant running with the land and as such binding on the last vendee who will thus become entitled to the title-deeds only subject to his being prepared to covenant with his vendor to produce the deeds and indemnify him against his liability to produce the same under the covenants found in the earlier sale-deeds.

KHIMJI KUVERJI SHAH *v.* LALJI KARAMSEY RAGHAVJI, I.L.R. (1941) Bom. 211.

This case decides the interesting question, probably for the first time directly, whether an action for damages for breach of promise of marriage will lie at the instance of a girl who being a minor at the time of the contract of betrothal was not a direct party to it. Contracts of betrothal may take several forms: (1) Where the intended bride and the intended bridegroom being both majors are parties directly to the contract. In such a case there can be no dispute that on breach thereof the innocent party can sue the party in breach for damages, the matter lying almost

entirely in the domain of contract law. (2) Where the proposed bride as well as the proposed bridegroom are both minors and the contract of betrothal is arranged by their respective guardians. Cases of this type are *Purushotamdas Tribhovandas* v. *Purushotamdas Mangaldas*[1], *Balubhai Hiralal* v. *Nanabhai Bhagubhai*[2] and *Kandaswami Naidu* v. *Kanniah Naidu.*[3] (3) Where the proposed bridegroom is a major and is a party to the contract of betrothal or has subsequently adopted or ratified the same, the proposed bride being however a minor. Contracts of this class are found in *Umed Kika* v. *Nagindas Narotamdas*[4], *Mulji Thakersey* v. *Gomti*[5], *Khimji* v. *Narsi*[6] and *Venkata Narasimha* v. *Govinda Krishna,*[7] and (4) where the proposed bridegroom is an adult but is not a party to the contract of betrothal the same having been arranged by the head of the family with the guardian of the proposed bride. In cases 2, 3 and 4 the question of damages on breach of the contract of betrothal has exhibited a tendency to come to the fore. In all these cases the principles of personal law applicable to the parties have cut into the law of contract and the extent to which the former will have to be accommodated into the latter has been the subject of judicial discussion. Action for damages has in some cases been brought by the proposed bridegroom, on the girl either refusing to marry him or on her being married to some one else by her parents or guardian, see *Umed Kika* v. *Nagindas Narotamdas*[4], *Mulji Thakersey* v. *Gomti*[5], *Purushotamdas Tribhovandas* v. *Purushotamdas Mangaldas*[1], *Khimji* v. *Narsi*[6] and *Balubhai Hiralal* v. *Nanabhai Bhagubhai*[2]. In some other cases the action has been by the girl (*e.g.*, the instant decision). In yet other cases the action for damages has been brought by the guardian of one of the parties as against the guardian of the other party. It has been suggested that where the contract of betrothal is not directly between the parties to the proposed marriage by reason of the minority of one or both of them the contract will be void if regarded as one by the minor or minors and will be unenforceable if regarded as a contract by the parents or guardians and that the minor or minors cannot sue on it being a stranger or strangers to the contract. The English common law rule enunciated in *Tweddle* v. *Atkinson*[8] that a stranger to the contract cannot sue upon it is however subject to certain well-recognised exceptions, one being in favour of a *cestui que trust,* while another exception is in the case of a contract by a guardian in favour of a

1. (1896) I.L.R. 21 Bom. 23.
2. (1919) I.L.R. 44 Bom. 446.
3. (1923) 46 M.L.J. 366
4. (1870) 7 Bom.H.C. O.C.J. 122.
5. (1887) I.L.R. 11 Bom. 412.
6. (1914) I.L.R. 39 Bom. 682.
7. 1937 M.W.N. 1274.
8. (1861) 1 B. & S. 393: 121 E.R. 762.

minor, *National Petroleum Co., Ltd.*, v. *Popatlal*[1]. To fit in a contract of betrothal into the latter category will not be warranted. It is debatable to predicate that it is for the benefit of the minor. Benefit will be essentially a question of fact dependent on circumstances that emerge posterior to the contract. Further a contract imposing a personal obligation on a minor cannot bind such person. None the less in *Rose Fernandez* v. *Joseph Gonsalves*[2], the Bombay High Court considered a contract of betrothal in India made by the parents or guardians of the parties to the proposed marriage as yet another exception to the rule in *Tweddle* v. *Atkinson*[3] and held that the girl who was a minor at the time of the contract of betrothal can on breach of it by the proposed bridegroom who had been a direct contracting party sue him for damages. The instant decision holds the principle to be equally applicable to Hindus also. The special facts of Indian life, the policy of the Hindu law and the authority afforded by the Shastras afford a pointer in that direction. Marriage for a Hindu male is practically compulsory, a *vyavasthitha vikalpa* and not *aicheehika vikalpa*, see *Kameswara Sastri* v. *Veeracharlu*[4]. It is obligatory on males who do not desire to adopt the life of a *naishtika* Brahmachari or of a Sanyasi, *Gopalakrishnam Razu* v. *Venkatanarasa Razu*[5], and the property of the joint family of which they are members will be bound by the expenses of their marriage, *ibid*. For a girl, marriage is the only samskara. A religious obligation lies upon her parents to provide for her so soon as she is a *matura viro*, a husband capable of procreating children, per Sir James Colvile in *Jumoona Dassya* v. *Bamasoondari Dassya*[6]. The marriage of Hindu children is really a contract made by their parents; the children themselves exercise no volition, *Dadaji Bhikaji* v. *Rukhmabai*[7], *Srinivasa* v. *Sesha*[8]. *Purushotamdas Tribhovandas* v. *Purushotamdas Mangaldas*[9]. There is no condition implicit in such a contract either that the girl should be willing to marry, see *Purushotamdas Tribhovandas* v. *Purushotamdas Mangaldas*[9], or that the boy should be willing to perform his part of the bargain, *Venkata Narasimha* v. *Govinda Krishna*[10]. Even if the proposed bridegroom was an adult at the time of the contract of betrothal, his assent to the transaction will be relevant and material only to fix him with liability for

1. (1936) 36 Bom.L.R. 610. 2. (1924) I.L.R. 48 Bom. 673.
3. (1861) 1 B. & S. 393: 121 E.R. 762.
4. (1911) 20 M.L.J. 855: I.L.R. 34 Mad. 422.
5. (1914) 23 M.L.J. 288: I.L.R. 37 Mad. 273 (F.B.).
6. (1876) L.R. 3 I.A. 72: I.L.R. 1 Cal. 289 (P.C.).
7. (1889) I.L.R. 10 Bom. 301.
8. (1918) 34 M.L.J. 282: I.L.R. 41 Mad. 197.
9. (1897) I.L.R. 21 Bom. 23, 30. 10. (1937) M.W.N. 1274

damages for breach of the contract of betrothal on his part. There are two ways in which the contract may be viewed, one in which the father may be deemed to act on behalf of his adult son as his agent in the contract, the other which according to Krishnan Pandalai, J., is the "more correct and complete view" being that the father acts not merely as the agent on behalf of the son but as the *head and representative* of the joint family of which the son is a member, *Venkata Narasimha* v. *Govinda Krishna*[1]. The contract of betrothal is in short an agreement between or on behalf of the respective families of the parties to the proposed marriage. That contracts of betrothal in India stand on a different footing from similar contracts in England was recognised by the Privy Council when it remarked in *Khwaja Muhammad Khan* v. *Hussaini Begum*:[2] "Their Lordships desire to observe that in India and among communities circumstanced as the Muhammadans among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts". The facts of Hindu life coupled with the policy of the Hindu law make it clear that when parents or guardians enter into a contract of betrothal on behalf of their children or wards, there is nothing either in the nature of the thing itself or in the social practices of the parties for the supposition that they are only expressing a wish or an intention about the desirability of the marriage without intending to make themselves or them liable on a contract. Nor is there any warrant for holding such a contract to be against public policy on the ground that the parents to whom is entrusted the duty to exercise their best judgment in choosing a suitable match for their child cannot bargain away in advance the freedom of that choice or that such contract takes away the right possessed by each person to choose a husband or wife for herself or himself, *Venkata Narasimha* v. *Govinda Krishna*.[1] The contract of betrothal being thus legal and intended to give rise to legal rights and obligations, the question is who can sue on a breach of the same and when. To apply to an action for damages for breach of such contract by whomsoever brought the nomenclature, breach of promise of marriage action, may not be technically correct. In substance, it is an action for damages against the party in breach, either by the other actually contracting party or by the person on whose behalf it was entered into or by the head of the family of which the innocent party was a member. On this subject it is stated in Manu,[3]

1. (1937) M.W.N. 1274.
2 (1910) 20 M.L.J. 614: L.R. 37 I.A. 152: I.L.R. 32 All. 410, 413 (P.C.).
3. IX, 99.

एतत्तु न परे चक्रुर्नापरे जातु साधवः ।
यदन्यस्य प्रतिज्ञाय पुनरन्यस्य दीयते ॥

"neither ancients nor moderns who were good men have ever given a damsel in marriage after she has been promised to another man." The rule is somewhat differently mentioned by Yagnavalkya:[1]

सकृत्प्रदीयते कन्याहरस्तां चोरदण्डभाक् ।
दत्तामपि हरेत्पूर्वाच्छ्रेयांश्चेदूर आव्रजेत् ॥

"once is a girl given, he who takes her back is to be punished like a thief; though betrothed she may be withheld if a better qualified suitor arrives". It is only where the suitor is faultless that the father of the girl can be punished for annulling a contract of betrothal of his daughter. Narada has remarked: "when a man, after having made a solemn promise of giving his daughter in marriage to a certain suitor does not give her afterwards he shall be punished by the king like a thief in case the suitor be faultless."[2] Likewise Gautama has stated: "though he may have promised it he should not fulfil his promise if the person to whom the promise is made is tainted with unrighteousness"[3]. On the question of the heads of damages, Yagnavalkya has remarked[4]: "for detaining a damsel after affiancing her, the offender shall be fined and should also make good the expenditure with interest." The Mitakshara explains[5]: "whatever has been expended on account of the espousals by the bridegroom for the gratification of his own or the damsel's relations, must be repaid in full, with interest by the affiancer to the bridegroom. The authorities thus indicate that the party in breach can be mulcted in damages and shall be bound to return the expenses incurred by the innocent party where the breach was unjustified and that retraction will be authorised where the original suitor was unrighteous or a better suitor became available. These principles will equally govern where it is the proposed bridegroom that is at fault and the action is brought either by the girl or on her behalf, *Venkata Narasimha* v. *Govinda Krishna*[6]. Only in the latter case proof merely that the proposed bridegroom has subsequent to the betrothal married another girl will be inadequate. It should be further shown that he has refused to marry the girl betrothed to him, in view of Hindu law allowing a plurality of wives to a person. The conclusions in the instant decision that a suit for damages for breach of contract of betrothal can be maintained by the girl though she was not an actual party to the

1. I, 65. 2. XII, 32.
3. V, 23; *see also* Vasistha cited in Col. Dig. II, 174, 175 and Katyayana cited in *ibid*, 177, 178.
4. II, 147. 5. II, xi, 28.
6. (1937) M.W.N. 1274.

contract by reason of her minority and that a contract of betrothal made by parents or guardians on behalf of their children or wards will be perfectly valid so as to give rise to legal obligations are thus in accord with authority, textual as well as judicial.

JETHMAL NARANDAS *v.* MAHADEV ANANDJI, I.L.R. (1941) Bom. 156.

This case decides a point of insolvency law relating to proof of debts, under the Presidency Towns Insolvency Act. It holds that where on the hearing of a judgment-creditor's petition for adjudication, the judgment-debtor in his affidavit alleged facts which if proved will negative the existence of the debt, the decree of the Court on which the petition was founded is not conclusive proof of the existence of the debt and the Insolvency Court ought not to pass the order of adjudication without being satisfied that the debt was in fact a good debt. S. 13 (4) provides that the Insolvency Court shall dismiss the petition if it is not satisfied with the proof of the facts mentioned in sub-S. 2 or if it feels that for other sufficient cause no order ought to be made. The provision corresponds to S. 25 of the Provincial Insolvency Act and S. 7 (3) of the English Bankruptcy Act, 1883, now S. 5 (3) of the Bankruptcy Act, 1914. As Lord Esher M. R., remarked in In re *Lennox*[1], "in making a receiving order the Court is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of his other creditors, who, if the order is made will not be able to sue the debtor for their debts and the Court ought not to exercise this extraordinary power unless it is satisfied that there is a good debt due to the petitioning creditor". James, L.J., put it on a slightly different ground when in *Ex parte Kibble*, In re *Onslow*[2], he stated: "It is the settled rule of the Court of Bankruptcy....that the Court can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of the debtor's goods among his *just* creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends and relations without any debt being due on them at all". *Prima facie* a judgment is sufficient evidence of the existence of a debt and imports consideration. There may however be circumstances brought to the notice of the Court casting suspicion upon the genuineness of the debt. The question then will not be so much what is the right of the debtor or what the conduct of the

1. (1885) 16 Q.B.D. 315 (C.A.).
2. (1875) 10 Ch. App. Cases 373, 376.

debtor or creditor has been, but rather whether the Court ought to exercise its power and authority in those circumstances. Even where the debtor had consented to a judgment on the debt the debtor may be estopped everywhere else from saying that there was no debt due; yet no such estoppel will be effective against the Bankruptcy Court, *Ex parte Lennox*[1]. In going behind the judgment the Court of Bankruptcy does not set aside the judgment; it only "goes round" the judgment and inquires into the subject matter, In re *Fraser, Ex parte Central Bank of London*[2], see also In re *Hawkins, Ex parte Troup*[3], In re *Van Laun, Ex parte Chatterton*[4], *A Debtor*, In re,[5] *Ram Lal Tandon* v. *Kashi Charan*.[6] The Insolvency Court has power at the instance of the judgment-debtor himself to go behind the judgment and examine the reality and existence of the debt even where the debtor had previously applied in the action to set aside the judgment and his application had been refused and the refusal affirmed by the Court of Appeal, In re *Fraser, Ex parte Central Bank of London*[2]. It would thus be immaterial whether the judgment has been obtained by consent or has been confirmed on appeal. The same power can be exercised by the Insolvency Court where a judgment had been obtained by compromise, In re *Hawkins Ex parte Troup*.[3] The real test will be whether regarding the judgment as conclusive proof of the debt would cause a failure of justice, In re *Flatan*.[8] The Insolvency Court need not even decide whether the judgment debt is really due but only whether there are circumstances justifying a refusal of a receiving order, In re *Victoria*.[9] Where the passing of a receiving order would in the circumstances be unfair to the other creditors, by paralysing unjustifiably their rights or by allowing room for fraud and collusion between the debtor and his friends or where the proof of the debt is inadequate or where there is any other sufficient cause a receiving order ought not to be made. The instant decision in holding that the existence of a decree in favour of the petitioning creditor is no conclusive proof of the debt on which the petition is founded and that the judgment-debtor in spite of his consenting to the decree being passed can set up facts before the Insolvency Court casting cloud upon the existence of the debt has merely given effect to the principles of English law though there are practically no decisions of our own Courts on this point.

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1. (1885) 16 Q.B.D. 315 (C.A.).
2. (1892) 2 Q.B. 633.
3. (1895) 1 Q.B 404.
4. (1907) 2 K.B. 23, 30.
5. (1927) 2 Ch. 367.
6. (1928) 26 All.L.J. 241.
7. (1888) 22 Q.B.D. 83, 85.
8. (1894) 2 Q.B. 387.

THIRUVENGADATHA AIYANGAR *v.* SANNAPPAN SERVAI, (1941) 2 M.L.J. 307.

This case decides that all debts incurred after the commencement of the Madras Agriculturists' Relief Act, 1938, even if they be in discharge of earlier debts will fall under S. 13 only, for purposes of relief under the Act and that S. 9 cannot apply. At first blush this interpretation of the scope of S. 9 may appear to be narrow and unwarranted. The purpose of the Act is to give relief to agriculturists. The measure of relief depends essentially on whether the debt sought to be scaled down was incurred before 1-10-1932 or on or after that date. In the former case S. 8 governs; in the latter case S. 9 operates. The term 'incur' refers to the inception of the debt, *i.e.*, to the time when the original obligation was created[1]. S. 9 in terms applies to debts incurred on or after 1-10-1932 but it does not say that its provisions will be inapplicable to debts incurred after 22-3-1938. Reading S. 9 in the light of the construction placed on the term 'incurred,' it may be argued that where a liability arising before 22-3-1938 is renewed subsequent to that date, the debtor can seek relief under that section with a view to get the advantage of the proviso to sub-S. (1). Such construction will also avoid the unnecessary hardship that may otherwise result. It is indisputable that if a liability had come into existence anterior to 22-3-1938 but subsequent to 1-10-1932 the debtor can have the benefit of S. 9. To hold that he will be precluded from such benefit merely because either out of ignorance, or inadvertence or for any other reason he has renewed the liability since 22-3-1938 may appear tantamount to frustrating the beneficent object of the Act. It might be said, that renewal means merely keeping alive whatever antecedent legal liability there was and does not *per se* import an extension of that obligation, and that if in respect of the original liability the legally recoverable amount would stand controlled by S. 9, a renewal can only be of the amount so recoverable and no more. But while it is true that a debt incurred on or after 1-10-1932 falls under S. 9 it is equally true that a debt incurred after 22-3-1938 falls under S. 13. The Act has to be construed logically. Overlapping cannot have been intended and any construction tending to that result should, if possible, be avoided. While in Ss. 8 and 9 there are specific provisions introducing the theory of renewals into the scaling down operations, it is significant that there are none in S. 13. The introduction of the theory of renewal in Ss. 8 and 9 is in accord with the declared policy of the Act, contained in S. 7, that any contract to the contrary in regard to a debt payable by an

1. (1939) 2 M.L.J. (N.R.C.), p. 57, (C.R.P. No. 1529 of 1938).

agriculturist at the commencement of the Act shall be ignored. The language of the section leaves it clear that the contracts referred to are those already entered into *i.e.*, before 22-3-1938. There is however no similar enunciation rendering un-enforceable contracts entered, subsequent to 22-3-1938, by which a debtor may waive, forego or abandon the benefits he may be entitled to under the Act in respect of a liability he had already incurred. Future contracts not being invalidated, by renewing a liability which arose before 22-3-1938, subsequent to that date, the debtor in effect gives up his rights to claim the advantages accruing under Ss. 8 and 9, if any, and elects to take the limited relief afforded by S. 13. This view is also in consonance with the rulings which hold that where after the passing of the Act, a debtor does not, in a suit to enforce an earlier liability, set up his plea to the benefit of S. 8 or S. 9, or where after a decree has been passed before the Act during the pendency of an appeal therefrom he does not claim a scaling down of his liability under those sections in the appeal, he will be precluded thereafter from claiming such benefit at any later point of time, see *Kotayya* v. *Venkata Punnayya*[1], *Srirama Reddi* v. *Srirama Reddi*[2]. The conclusion arrived at in the instant decision that there is a *terminum a quo* as well as a *terminus ad quem* within which a debt should have been incurred for S. 9 to apply, and that where the debt sought to be scaled down has been contracted after 22-3-1938, S. 13 alone can apply and the theory of renewals cannot be imported has the merit of harmonizing the provisions of the Act and making them logical.

RANGA RAO NAIDU *v.* JANAKI PRASAD, (1941) 2 M.L.J. 452.

A point concerning the scope of S. 152, Civil Procedure Code, came up for decision in the above case and it was held that there was no warrant for restricting the section to the correction of errors or mistakes which occur for the first time in the plaint or subsequent proceedings. There is nothing in the section itself about the stage or time within which the mistakes sought to be corrected should have arisen. Nor should there be any limitation according to the sense of the thing. The power is one intended to promote the ends of justice and avoid its miscarriage and it will be an unnecessary hindrance to prescribe any time limit. The interpretation, however, of this 'slip rule' has occasioned a diversity of judicial opinion. Some decisions have held that S. 152 is inapplicable to rectify mistakes which had an origin anterior to

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1. (1940) 2 M.L.J. 202. 2. (1941) 2 M.L.J. (N.R.C.), p. 46.

the filing of the suit, see *Bala Prasad* v. *Kanoo*[1], *Ramchander Sarup* v. *Mazhar Hussain*[2], *Shujaatmand Khan* v. *Govind Behari*[3]. Other cases have taken a wider view of the scope of S. 152. In *Somasundaram Chettiar* v. *Veluswamy Naicker*[4], it was observed: "the time when the clerical errors . . . . . . were first introduced in the transactions or proceedings between the parties is immaterial and the Court has power to amend such clerical errors",—see also *Mahaboob Begum Sahiba* v. *Lal Begum Saheba*[5]. It is not however clear whether in the first case the mistake that crept into the pleadings and decree was one anterior to the suit, occurring in some document copied into the plaint. *Maung Chit Hlaing* v. *N. A. R. M. Chetty*[6], *Satyanarayana Rao* v. *Purnayya*[7] and *Shiam Lal Pandit* v. *Mt. Moona Kuar*[8], are however such cases, and the mistakes were corrected on application to amend the decree under S. 152. The view taken in the instant decision is not only in accord with the earlier Madras decisions but receives support from the rulings of the Lucknow Chief Court and the Rangoon High Court.

Judicial opinion is not uniform as to the procedure to be followed in such cases. In *Somasundaram Chettiar* v. *Veluswamy Naicker*[4], it has been suggested that the Court can on application under S. 152 amend the mistake or error in the decree without the necessity of having the prior pleadings in which the same errors had appeared themselves amended as a preliminary requisite to the amendment of the decree. But in *Latchayya* v. *Seethamma*[9], it was stated that the applicant should apply for the rectification of the deed wherein the mistake originally appeared and then apply for the amendment of the plaint before the decree is executed and finally apply for the amendment of the judgment and decree to correspond with the amended plaint. In *Aziz Ullah* v. *Collector of Shahjahanpur*[10], the Allahabad High Court has expressed the view that where the mistake first occurred in a mortgage deed which was copied into the plaint, the decree and the sale certificate, correction of the mistake in the plaint, decree and sale certificate could be sought by the same application and that in such a case while the Court will act under S. 152 to amend the decree, it can order correction in the plaint and the other documents only in the exercise of its inherent powers under S. 151. This distinction stands supported by the language of S. 152 which in terms refers

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1. (1911) 14 I.C. 407 (Nag.)
2. (1919) 51 I.C. 55 (All.)
3. A.I.R. 1934 All. 100 (2).
4. 1914 M.W.N. 107.
5. (1921) 14 L.W. 445.
6. A.I.R. 1924 Rang. 104.
7. (1930) 61 M.L.J. 805.
8. (1933) I.L.R. 8 Luck. 734.
9. (1932) 62 M.L.J. 350.
10. (1932) I.L.R. 54 All. 800.

to amendments of judgments, decrees and orders only. In view of the diversity of judicial opinion on the question of procedure to be followed in getting the mistakes corrected, elucidation by the Privy Council is certainly to be desired.

NARIKKAL CHATHAN *v.* VEETHIYOTTILLATH KESAVAN, (1941) 2 M.L.J. 455:

This case affords an illustration of seemingly plain language in a statute giving rise to conflicting interpretations. Ss. 14 and 20 of the Malabar Tenancy Act dealing with suits for eviction by a landlord state *inter alia* that if the "landlord requires the holding *bona fide* for his own cultivation", a suit for eviction shall lie. The phrase '*bona fide*' means 'honestly', see *Queen* v. *Holl*[1]. Its correct province is to qualify things or actions that have relation to the mind or motive of an individual. In other words it refers to a mental fact and not to a fact completely within physical apprehension. As regards the term 'require', Hamilton, L.J., observed in *Metropolitan Water Board* v. *Johnson & Co*[2]: "The word 'require' is used in respect of an animate person, and presumably, therefore, has some reference to his mentality. I do not think that the word 'require' can be construed as meaning 'need' ". It is thus clear that the expression 'the landlord requires the holding *bona fide* for his own cultivation' has no relation to any genuine 'need' felt by the landlord, but merely, that he should honestly and not corruptly or out of ulterior motives desire to have the holding for his own cultivation. The only limitation that can therefore attach is that the Court must be satisfied that the assertion by the landlord is not an empty declaration or prompted by ulterior motives and it will be competent to the Court to investigate whether the statement was honestly made, see *Narayanan Moossad* v. *Mammadissa*[3]. On this test, it is easy to agree with the conclusion of Buckland, J., in *Rekhabchand Doogar* v. *D'Cruz*[4],—a case under the Calcutta Rent Act, 1920—that a landlord who with a view to let at a profitable rent the place where he was actually residing gave notice to a tenant in occupation of other premises belonging to him to vacate the same as being required for his own occupation, cannot be deemed to 'require the premises *bona fide* for his own occupation', without at the same time accepting his dictum that the word 'require' imports the element of 'need' and should be something more than 'desire'. Buckland, J's dictum however found favour in Madras, in *Raman Nayar* v. *Kesavan Embrandri*[5], but a

1. (1881) 7 Q.B. D. 575.
2. (1913) 3 K.B. 900 (C.A.).
3. A.I.R. 1937 Mad. 795.
4. (1922) 26 C.W.N. 499.
5. (1941) 2 M.L.J. 456, f.n.

contrary view was taken in *Eerayi Achuthan* v. *Poochakkandi Panakat Katheeja Bi*[1]. The instant decision by its approval of the latter view has interpreted the expression 'requires *bona fide*' in conformity with the sense of the words as accepted in English law.

EMPEROR *v.* BATLIWALLA SONS & CO., LTD., I.L.R. 1941 Bom. 186:

The meaning of the expression "outside the office" in S. 73 of the Indian Companies Act, 1913, prescribing that every limited company shall paint or affix its name on the outside of every office or place in which its business is carried on was the subject of decision in the above case. It was held that where the office of a limited company was located on the upper storey of a bungalow which had a compound with two gates, the placing of the board bearing the name of the company outside the office room was a sufficient compliance with the section and failure to have the boards outside the premises cannot justify the imposition of a penalty under S. 74. The term 'office' merely signifies a place where a particular kind of business or service for others is transacted, the room in which the business or work of a large concern or company is carried on or from which it is directed. In this sense an office need not even be a completed building, *R* v. *Manning*[2]. A name board might be intended to serve one or some or all of three purposes, namely, (1) to secure publicity and advertisement for the company, (2) to facilitate and assist customers to locate the office, or (3) to emphasise and impress upon the public its distinctive character, that it is a *limited* company. Obviously the first of these considerations being a matter affecting the company only could not be the basis of the penal provision in S. 74. Nor can the second of the objects be the basis of the prescription. If customers find difficulty in locating the office it might result in business falling, but that will be no reason to treat failure to have a name board as required an offence. The *raison d'etre* is really the third of these considerations. In regard to S. 93 (1) (*a*) of the English Companies Act, 1929, Palmer states:[3] "Why this solicitude on the part of the legislature as to the publication of a company's name? The answer is, that the legislature whilst allowing limited liability desired by this means to make the company itself continually bring to the notice of those who dealt or might deal with it the fact that it was limited." For it is essentially in the interests of the public that they should know the

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1. (1941) 2 M.L.J. 458, f.n. 2. (1871) 25 L.T. 573.
3. Company Law, 15th edn., p. 261.

nature of the company, since rights and liabilities are differently conditioned according as a company is limited or not and the public should not be misled or deceived in this respect. Such being the object underlying the rule in S. 73 and the penalty in S. 74, when once the public receive intimation before they get into the office that it is a limited concern with which they are invited to do business, by the name board being displayed outside the room, it can scarcely be contended that there is a violation of S. 73 by the board not being exhibited in the compound as well.

AMBABAI *v.* KESHAV BANDOCHAND, I.L.R. 1941 Bom. 250.

In this case it is decided *inter alia* that Jains are within the ambit of the term 'Hindu' in the Hindu Law of Inheritance (Amendment) Act, 1929 and that the phrase 'law of Mitakshara' in S. 1 of that Act includes the Mayukha school as well. That the Mayukha school was only a sub-school of the Mitakshara is borne out by the Privy Council decisions that the Mitakshara is universally accepted by all the schools except that of Bengal as of the highest authority, see *Bhugwandeen* v. *Myna Bai*[1], *Collector of Madura* v. *Mootoo Ramalinga*[2]. The expression "according to the school of the Mitakshara law, by which the male was governed" in S. 3 (b) of the Act is also a pointer in the same direction. In the statements of Objects and Reasons to the Bill, after specifically excluding the Dayabhaga school from the purview of the Bill it is mentioned that "the Bill will not make any serious inroad upon the law as understood in the province subject to the Mayukha, nor will it seriously affect the law as understood in the province of Madras", thereby showing that all the provinces acknowledging the supreme authority of the Mitakshara are to be within the scope of the Act. It is thus clear that the phrase 'law of Mitakshara' should be understood as a compendious way of referring to Hindu law inclusive of the Mayukha school, but exclusive of the Dayabhaga school. Curiously enough a statement of Sir Dinshaw Mulla in the 7th edition of his Hindu law, in discussing the position of the sister in Bombay after the passing of the Act II of 1929—"This difficulty (namely, as to the sister's position) cannot arise in places where the Mayukha is the over-ruling authority, such as Guzarat . . . for the Act applies only to cases subject to the law of the Mitakshara"[3]—seems to suggest a contrary conclusion. The view taken in the decision under review does not however lend support to that conclusion and is in accord

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1. (1867) 11 Moo. I.A, 488, 507, 508.
2. (1868) 12 Moo. I.A. 397.
3. P. 40.

with what has generally been accepted as the correct position, that the Mayukha school is not a separate school of Hindu law but is only a sub-school of the Mitakshara law.

CHHOTIBAI DAULATRAM *v.* MANSUKHLAL JASRAJ, I.L.R. 1941 Bom. 34.

This case decides an interesting question under the Indian Registration Act, namely, whether properties subject to an attachment before judgment in a money suit can on a decree being passed in terms of compromise of the suit claim, containing *inter alia* a provision charging the self-same properties as security for payment of the decretal amount, be said to form the subject-matter of a suit or proceeding for purposes of S. 17 (2) (*vi*) of the Act, exempting such a decree from necessity for registration. In answering the question in the negative, Beaumont, C.J., and Wassoodew, J., hold that the term 'proceeding' in the section means an independent orininating proceeding and will not include any interlocutory proceeding, thereby dissenting from the view expressed in *Govindasami Mudaliar* v. *Rasu Mudaliar*,[1] that an application for an attachment before judgment will be a 'proceeding' within the meaning of S. 17 (2) (*vi*)—a view approved in Bombay itself in *Krishna* v. *Madhav*.[2] S. 17 requires registration of all non-testamentary instruments which operate to create, etc., any right, title or interest of the value of Rs. 100 and more to or in immovable property. Sub-S. 2 postulates certain exceptions. According to Cl. (*vi*) nothing in S. 17 (1) (*b*) or (*c*) shall affect "any decree or order of a Court, except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding." Under the clause as it originally stood all "decrees and orders of Courts" were exempted from necessity for registration, but the present clause was substituted by S. 10 of the Transfer of Property (Amendment) Supplementary Act, 1929. What then is the import of the expression 'subject-matter of the suit or proceeding'? An allied expression 'relates to the suit' in O. 23, r. 3, C. P. Code has been construed as being wide enough to include cases where immovable property is charged by a decree passed in terms of a compromise with payment of the decretal amount in suits for money, see *Joti Kuruvetappa* v. *Izari Sirusappa*,[3] *Gobinda Chandra Pal* v. *Dwarka Nath Pal*.[4] The expression 'subject-matter of the suit' is however a much narrower expression.

1. (1934) 68 M.L.J. 41: I.L.R. 58 Mad. 781.
2. I.L.R. (1938) Bom. 738.
3. (1907) I.L.R. 30 Mad. 478.
4. (1908) I.L.R. 35 Cal. 837.

'Relates' means 'refers to' or 'is connected with,' and hence can cover cases of property not being directly but only indirectly or incidentally associated with the litigation. As has been pointed out in *Ramayya* v. *Ranga Raju*,[1]—in holding that a decree in terms of a compromise creating a charge on lands, in a suit on a promissory-note executed by a father claiming relief against his sons also by way of a prayer to have the liability satisfied out of the joint-family properties, requires registration—there must be a claim or right in or to the specific immovable property asserted in the litigation and relief sought in respect thereof in order to make the said property the subject-matter of the litigation. The question will then be whether, when immovable property over which a compromise decree purports to create a charge had been the subject of an order for attachment before judgment in the suit, the application was not a 'proceeding' the subject-matter of which was the land in question, and as such whether the order was not exempt from the need for registration, and whether by reason of such exemption of the order the compromise decree which in effect extends the effect of the attachment order by charging the properties concerned with the payment of the decretal amount will also not be equally exempt. The C. P. Code treats an application for attachment before judgment as a "supplemental proceeding"—see the heading of Chapter VI. Also, a 'proceeding' signifies in legal parlance "any application to a Court of Justice, however made for aid in the enforcement of rights, for relief, for redress for injuries, for damages or for any remedial object".[2] Thus a 'proceeding' may be either originating or interlocutory, and an application for attachment may be a 'proceeding' in that sense. The question will still remain whether it is in that sense that the term has been used in S. 17 (2) (vi). The collocation 'suit or proceeding' seems to suggest an *ejusdem generis* construction. Further an attachment is merely in the nature of an injunction restraining a party from disposing of the land or property. It is an order operating in *personam* only and does not create any right or interest in the land. The view taken in the decision under review seems for the reasons set out to be more acceptable than that expressed in *Govindasami Mudaliar* v. *Razu Mudaliar*[3].

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1. (1938) 1 M.L.J. 325.
2. Black, Legal Dictionary, 2nd edn., p. 947.
3. (1934) 68 M.L.J. 41: I.L.R. 58 Mad. 781.

PATTU ACHI *v.* RAJAGOPALA PILLAI, (1941) 2 M.L.J. 134.

How the blending of modern notions of inheritance with the purely spiritual idea underlying the Hindu conception of adoption may produce a situation where fiction and logic are irreconcilable is illustrated by this case, where a question of some importance and difficulty in the law of adoption fell to be decided directly. The decision was that an adopted son will, immediately on adoption, acquire a right to sue for recovery of property unauthorisedly alienated by his adoptive mother prior to his adoption even where such property had been vested in her not as heir to her husband but as heir to her predeceased son. It is indisputable that where the adopting widow had inherited the property from her husband "the rights of an adopted son are not prejudiced by any unauthorised alienation by the widow which precedes the adoption which she makes," *Collector of Madura* v. *Mootoo Ramalinga*,[1] *Bonomali Roy* v. *Jagat Chandra Bhowmick*.[2] This is because the adoption of a son is tantamount to the appointment of an heir to the husband and prior to the Hindu Women's Rights to Property Act, 1937, a son was superior to the widow as an heir and when a widow adopts she is creating an heir who comes in front of her. It was open to the widow to adopt or not, but when she elected to adopt, she having by her deliberate act created an heir who under the law would rank prior to her in the line of succession to her husband, should be deemed to have intended the natural and legal consequences of her act. But where after inheriting as a mother, a widow adopts, the position is not the same, see *Madana Mohana* v. *Purushothama*.[3] There is no question of the appointment of an heir to her husband in such a case, for the property if any had already devolved on his son who thereby had become the last full owner. Nor is there any doctrine making the validity of an adoption dependent on the adoptee taking property. The doctrine of devolution of property is altogether a secondary consideration in regard to the capacity of a widow to adopt, *Amarendra Man Singh* v. *Sanatan Singh*.[4] The validity of an adoption is not conditioned by the existence of any estate. Why then should it be that on adoption by a widow after having inherited to her son, the estate so vested in her should be divested? That the divesting cannot certainly be justified on the ordinary rules of inheritance has often been conceded, see *Rai Jatindra Nath Chowdhuri* v. *Amritlal Bagchi*,[5] *Hamed Gazi* v. *Sadat Ali Sikdar*.[6] The question will therefore be

1. (1868) 12 Moo.I.A. 397, 443 (P.C.).
2. (1905) 15 M.L.J. 267: L.R. 32 I.A. 80: I.L.R. 32 Cal. 669 (P.C.).
3. (1918) 35 M.L.J. 138 : L.R. 45 I.A. 156 : I.L.R 41 Mad. 855, 859 (P.C.).
4. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642, 650 (P.C.).
5. (1900) 5 C.W.N. 20. 6. (1940) 44 C.W.N. 443.

whether there are any special considerations why the ordinary rules of inheritance shall not apply. Various suggestions are to be found in the judicial decisions. One such is that by adopting a son to her husband a widow must be presumed to intend the vesting of the estate that originally belonged to her deceased husband in such adopted son, see *Rai Jatindra Nath Chowdhuri* v. *Amritlal Bagchi*.[1] This theory cannot obviously apply where the inherited property consisted of the self-acquired or separate property of her deceased son. Again, to argue that the mother should be deemed to hold the inherited property as her husband's property and thereby intended its divestiture has no warrant either factual or otherwise. Another suggestion is that the effect of the adoption being to make the adopted son the son of her husband, he must be treated as if he had been born or at all events conceived in the life-time of her husband and his title relates back to the date of the death of the predeceased son, so that if the latter left no widow or child who would succeed him to the exclusion of his younger brother by adoption, such adopted son succeeds as heir to his father. *Apropos* this line of reasoning the Allahabad High Court has remarked: "this view seems to be the reasonable and necessary consequence of the fiction that the widow, by adoption, makes the adopted son the son of her deceased husband," *Lakhmichand* v. *Gatto Bai*.[2] The theory is clumsy and unworkable and will really carry fiction to illogical limits. A third explanation in support of the doctrine of divestiture is to be found in *Sukhdevdoss Ramprasad* v. *Mt. Choti Bai*,[3] where it is stated that in all these cases the nature of the estate to be divested is irrelevant and that it is *the person by whom it is held that should be considered*, the suggestion being that if the estate was with the widow it will be divested but not if it is with any one else. This view has no longer any force having regard to the rulings of the Privy Council that even where properties had vested absolutely in a third person there might be a divestiture of such estate in favour of the adopted son in certain circumstances, see *Amarendra Man Singh* v. *Sanatan Singh*,[4] *Vijai Singji* v. *Shiva Sangji*.[5] Yet another explanation to support divestiture is to be found in *Hanmant Subbayya* v. *Krishna Manjinath*,[6] namely, that by virtue of the adoption, the adopted son acquired an "*inherent right*" to the property with the widow and the fact that there had been a predeceased son from whom only the widow got the property in no

1. (1900) 5 C.W.N. 20.
2. (1886) I.L.R. 8 All. 319.
3. (1927) 27 L.W. 145.
4. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
5. (1935) I.L.R. 59 Bom. 360.
6. (1925) I.L.R. 49 Bom. 604, 607.

way affected the right. It may be remarked that this is really an assumption serving as an argument.

In *Suryanarayana v. Ramadoss*[1] it has been remarked by Seshagiri Aiyar, J: "The *Guntur case*[2] . . . is authority for the proposition that a mother succeeding as heir to her son would be divested by her adopted son of the inherited property. There can be no distinction in principle between property owned as ancestral or which is taken as a self-acquisition". The last statement does not seem to be sound in principle as it ignores the fact that the adopted son can at best on adoption be entitled to succeed only to what is or could have been the property of the adoptive father, and not for instance to property which the adoptive mother has inherited from her own father or which she holds as stridhana. If property which she had inherited from her father will not be divested on an adoption by her there is no reason why property which she had inherited from her son should be subject to a different result. *The Guntur case*[2] has, however, been relied on as postulating divestiture in such circumstances, at any rate, of property inherited by the widow from her son, see *Jamnabai* v. *Raychand Nahalchand*[3], which in its turn was looked upon as decisive of the question in *Raviji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai*.[4]

In the *Guntur case*[2], no doubt the adoption was made by a widow who had succeeded to a zemindari as heir to her son. The Privy Council stated: "There is no ground for saying that because the estate descended to the son natural born of the original Zemindar, and the widow of the latter took it as heiress of her son and not immediately from her husband the adoption made by her if otherwise valid therefore became invalid". At another place the Privy Council observed: "The fact of the descent being cast would have made no difference unless the case fell within the authority of that of *Chundrabullee* reported in the 10th Moore." All these observations are however concerned only with the validity of the adoption and not with the divestiture of estate as a consequence thereof, the case itself being one where the adopted son sued for recovery of possession of the estate *after the death of the adoptive mother*, from her daughters who had taken possession of the same. In *Mt. Bhoobun Moyee* v. *Ramkishore*,[5] the Privy Council had explicitly laid down that in the case of inheritance *the person to succeed must be the heir to the last full owner*, but had added that if after inheriting to her son who had died unmarried the widow adopted to her husband, she would have divested no

1. (1917) 34 M.L.J. 87: I.L.R. 41 Mad. 604.

2. *Venkatakrishna Rao* v. *Rama Lakshmi* (1876) L.R. 4 I.A. 1: I.L.R. 1 Mad. 174 (P.C.).

3. (1883) I.L.R. 7 Bom. 225.

4. (1887) I.L.R. 11 Bom. 381.

5. (1865) 10 Moo.I.A. 279, 311, 312 (P.C.).

estate but her own and "this would have brought the case within the *ordinary rule*". How the case will fall within the *"ordinary rule"* set out earlier, is difficult to envisage, for if really the adopted son in such a case divested his mother, it certainly cannot be in the capacity of heir to the last full owner. That in fact the Privy Council did not in any manner pronounce on this question either in *Chundrabullee's case*[1] or in the *Guntur case*[2] is clear from the observations of the Board in *Ramasami Aiyan* v. *Venkataramaiyan*[3]: "Whether by the act of adopting another son she in point of law divested herself of that estate in favour of the second son may be a question of some nicety *on which their Lordships give no opinion*". Incidentally it falls to be noted that Sir James Colvile, who was a member of the Board was also a party to the decision in the *Guntur case*[2].

A number of decisions have in fact taken the view that where a woman after succeeding as heir to her son adopts a boy, the adopted son will neither divest her estate, [see *Bykant Monee Roy* v. *Kisto Soonderee Roy*[4], *Puddo Kumaree* v. *Juggut Kishore*[5]] nor can recover property unauthorisedly alienated by her so long as she is alive, [see *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*[6]].

To treat the rights of the widow in the property which she holds as heir to her son as being co-extensive in all respects with the rights which she possessed when she held it as her husband's heir, or to remark that if an alienee could be defeated by a first adoption except in the case of necessity it is difficult to see why he should not be defeated in the case of a second adoption seems with all respect, to push analogies beyond the permissible limits. There is no binding decision of the Privy Council on the point. Judicial opinion of the Calcutta High Court in its early decisions is against the theory of divestiture of the mother's estate. The Bombay view in favour of divestiture rests on a loose appreciation of the scope of the ruling in the *Guntur case*[2]. Nor is the view in consonance with the doctrine that inheritance should be traced to the last full owner. Above all to hold in favour of divestiture of the mother's estate will be opposed to the policy underlying the Hindu Women's Rights to Property Act seeking to give the widow a share even when there is an *aurasa* son. Nor is it open to us to seek consolation in the fact that law is not always logical, a course deprecated by the Privy Council in another context[7]. In these circumstances it is highly essential that the point dealt with in the instant decision should be elucidated finally by the Judicial Committee.

1. *Mt. Bhoobun Moyee* v. *Ram Kishore,* (1865) 10 Moo.I.A. 279 (P.C.).
2. (1876) L.R. 4 I.A. 1: I.L.R. 1 Mad. 174 (P.C.).
3. (1879) L.R. 6 I.A. 196: I.L.R. 2 Mad. 91 (P.C.).
4. (1867) 7 W.R. 392.
5. (1879) I.L.R. 5 Cal. 615, 644.
6. (1875) 24 W.R. 183.
7. *See* (1918) 36 M.L.J. 493: 46 I.A. 72: I.L.R. 42 Mad. 523 (P.C.).

HAMIDGANI AMMAL *v.* AMMASAHIB AMMAL, (1941) 2 M.L.J. 622 (F.B.).

This Full Bench decision holds that a person brought on record in execution proceedings as the legal representative of a judgment-debtor is not compelled to have his own claims to the property in suit decided in the execution proceedings but can establish his rights by a separate suit. O. 22, r. 4 (2), Civil Procedure Code which entitles the legal representative of a defendant to make only a defence appropriate to his character as such legal representative is not applicable to proceedings in execution of a decree or order (see O. 22, r. 12). There is no bar to a legal representative urging his independent rights in execution, if in fact he is bound so to do under S. 47. That section directs that all questions between the parties to the suit in which the decree was passed or their representatives and relating to the execution of the decree shall be determined by the executing Court only. In *Kuriyali* v. *Mayan*[1], a case of a suit on a mortgage, the legal representative who was brought on record on the death of the judgment-debtor after the passing of the mortgage decree claimed in the execution proceedings an independent title to the mortgaged property. The Munsif investigated the matter in execution but on appeal the District Judge held that the title of the legal representative cannot be investigated in execution but that there should be an attachment in which the legal representative can make a claim and in that way have his title gone into. That course was adopted. The claim being rejected, the legal representative (claimant) brought a separate suit to have the execution sale annulled. It was held that the suit was incompetent. In doing so the High Court pointed out that it makes no difference whether the legal representative was brought in before the decree or after, that S. 50 (old S. 234) fully empowers the executing Court to inquire whether any particular property in the hands of the legal representative or which came into his hands was the property of the deceased judgment-debtor and that S. 47 (old S. 244) prohibits any separate suit to investigate the question whether the property mentioned in the decree was available for execution, the question being one relating to the execution of the decree and arising between the decree-holder and the legal representative of the judgment-debtor. It is true that the decision overlooked the fact that the decree being a mortgage decree there can be no question of any attachment in execution; nevertheless it is valuable as expounding the scope of S. 47, and in fact that aspect fell to be noticed commanding the approval of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*[2]. That was a case where the question arose

1. (1883) I.L.R. 7 Mad. 255.

2. (1892) L.R. 19 I.A. 166; I.L.R. 19 Cal. 683 (P.C.).

whether a judgment-debtor can sue to set aside a Court auction sale in execution of a decree on the ground of collusion between the decree-holder and the auction purchaser in proceeding with the sale while in fact the decree had been satisfied as against the particular judgment-debtor, and contrary to an agreement with him not to bring the property to sale. In repelling the contention that the suit will be competent inasmuch as the auction purchaser who was alleged to have colluded with the decree-holder was not a party to the decree in the suit and hence not among the "parties" referred to in S. 47 and relief against him also was sought, Lord Macnaghten referred to their Lordships examining, *Kuriyali* v. *Mayan*[1] and other cases to understand the scope of S. 47 as interpreted in India and then stated: "It is of the utmost importance that all objections to execution sales should be disposed of as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of S. 244 (now S. 47). In *Amirchand* v. *Bakshi Harihar Prashad Singh*[2], a decree for sale was passed in a *mortgage suit*. After the decree was made, one of the defendants died and in the application for the execution of the decree the legal representative of the defendant was brought on record. He raised objections before the execution Court to the execution proceeding. Some of the objections were rejected. Later on, the legal representative filed a suit raising the same objections but adding two other persons as parties. In dismissing the suit as incompetent, Sir John Edge after citing Lord Macnaghten's observations in *Prosunno Kumar Sanyal's* case[3] remarked: "The questions raised in this suit *could* have been . . . raised by Babu Amir Chand under S. 244 of the C. P. Code, 1882, and *whether then raised or not* . . . they are questions which relate to matters which by S. 244 was enacted 'shall be determined by orders of the Court executing the decree and not by a separate suit'." *Kuriyali* v. *Mayan*[1] was thus approved in *Prosunno Kumar Sanyal's case*[3] by the Privy Council and this in turn was followed in *Amir Chand* v. *Bakshi Harihar Prashad Singh*[2].

The view in *Kuriyali* v. *Mayan*[1] has also been adopted in a number of decisions in India, *Vengapayyan* v. *Karimpanakal Parvati*,[4] *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot*,[5] *Kelu*

1. (1883) I.L.R. 7 Mad. 255.
2. (1915) 30 M.L.J. 238 (P.C.).
3. (1892) L.R. 19 I.A. 166: I.L.R. 19 Cal. 683 (P.C.).
4. (1902) I.L.R. 26 Mad. 501.
5. (1906) 17 M.L.J. 377: I.L.R. 30 Mad. 215.

Achan v. *Parasu Pattar*[1], *Venkatakrishnayya* v. *Venkatanarayana*[2] etc.

Some decisions have suggested a distinction between a money decree and a mortgage-decree in this connection. In *Lloyds Bank Ltd.* v. *Rehmat Bibi*[3], Addison and Abdul Rashid, JJ., have pointed out that while in the case of a money decree it is for the executing Court, even where the legal representative raises an objection not open to the judgment-debtor but based on an independent title, to determine how the decretal amount is to be recovered and what property is to be sold in execution, in the case of a mortgage-decree the method of recovery stands determined by the trial Court itself and the claim of a legal representative that certain property is not liable to be sold in execution will be an attack on the decree itself and hence could not be gone into by the executing Court, [see also *Lakshmadu* v. *Ramudu*[4]]. A different view, holding that even in the case of a mortgage-decree the executing Court can examine the independent claim to the property in suit set up by a legal representative, is propounded in *Peer Bathummal Beevi* v. *Nagur Meerammal Beevi*[5], *Chinnathayee* v. *Lakshmi Achi*[6]. The true principle seems to be the one indicated by Edge, C.J., in *Sethchand Mal* v. *Durga Dei*[7], namely, that "where the representative merely asserts that the property sought to be sold is his own property to which he is beneficially entitled by purchase or from its having come to him otherwise than as a representative of the deceased judgment-debtor, it is not a case in which he has set up a *jus tertii*". In such a case it is in execution that the claim will have to be investigated and no separate suit can lie. No doubt the case will be different and a separate suit will be competent if the legal representative opposed the execution on the ground that the property had vested in him as a trustee or as executor of some one else *i.e.*, in some character wholly separate from his personal and individual character. The instant decision in over-ruling *Kuriyali* v. *Mayan*[8] does not seem to have noticed that that decision as expounding the scope of S. 47 (old S. 244) has been cited with approval by Lord Mac-

1. (1916) 5 L.W. 158.

2. A.I.R. 1936 Mad. 733, see also *Machamma* v. *Kanakamma*, A.I.R. 1935 Mad. 923, *Seth Chand Mal* v. *Durga Dei* (1890) I.L.R. 12 All. 313 (F.B.), *Kalicharan* v. *Jewat* (1906) I.L.R. 28 All. 51, *Raj Rup Singh* v. *Ramgolam Roy*, (1888) I.L.R. 16 Cal. 1, *Murigaya* v. *Hyat Saheb* (1899) I.L.R. 23 Bom. 237, *Gokul Singh* v. *Kissen Singh* (1910) I.L.R. 34 Bom. 546.

3. A.I.R. 1939 Lah. 178.

4. I.L.R. (1940) Mad. 123.

5. (1936) 71 M.L.J. 725.

6. (1936) 71 M.L.J. 511.

7. (1890) I.L.R. 12 All. 313 (F.B.).

8. (1883) I.L.R. 7 Mad. 255.

naghten in *Prosunno Kumar Sanyal's case*[1], which again has been followed by the Privy Council in *Amir Chand* v. *Bakshi Harihar Prashad Singh*[2], a case where the objections were raised by the legal representative of a defendant in a *mortgage suit* to the execution of the mortgage-decree for sale. In these circumstances therefore the decision under review cannot be deemed to be the last word on that subject.

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1. (1892) L.R. 19 I.A. 166: I.L.R. 19 Cal. 683 (P.C.).
2. (1915) 30 M.L.J. 238 (P.C.).

KARAN SINGH *v.* RAM SAHAI, I.L.R. (1941) ALL. 39.

This case decides a question of practice. It holds that an *interim* attachment before judgment is effective against a transfer of property made by the debtor after affixation of a copy of the attachment order on the property affected, *though no copy of the order had been served upon the debtor.* O. 38, r. 7, C. P. Code states that in the case of an attachment before judgment, save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree. As there is no express provision elsewhere on the subject in any of the rules relating to attachment before judgment it follows that such attachments are governed by the provisions of O. 21, r. 54. This rule merely states that in the case of immovable property the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property and that the order shall be proclaimed at some place on or adjacent to the property and that a copy of the order shall be affixed on a conspicuous part of the property. There is however no direction that a copy of the order should be personally served upon the owner of the property attached. It is settled law that " no property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order, the other things prescribed by the rules in the Code have been done;" *Muthiah Chetti* v. *Palaniappa Chetti*[1]. Unless all the processes of attachment which are required by law to effect a valid attachment have been *served*, there is no such valid attachment of the property as would interdict its transfer, under S. 64, C. P. Code, *Bai Hakimbu* v. *Dayabhai Rugnath*[2]. Does this mean that though not prescribed under the Code, notice of attachment under O. 21, r. 54 should be served on the defendant? Certain observations in *Ramanayakudu* v. *Boya Pedda Basappa*[3], seem to favour this construction. Phillips, J., observed in that case : " The rule says that the order must be one prohibiting the judgment-debtor, and . . . . in order to make an order prohibitive, the person prohibited must have the opportunity afforded by the application mentioned in Cl. 2 of r. 54 of *knowing* that he is so prohibited . . . A perusal of rr. 43, 44, 46, 47, 48 and 51 to 53 of O. 21 shows that the principle underlying the procedure in each case is to make the attachment *known* to the person affected by the order." If knowledge is thus the main element, it is difficult to see how a mere affixture of the order on the property could ensure that object. A recent decision, *Appanna Sastri* v. *Raja Sobhanadri Appa Rao*[4], has held that there is no necessity under S. 117 of the Estates Land Act to give *personal* notice of a sale

1. (1928) 55 M.L.J. 122: L.R. 55 I.A. 256: I.L.R. 51 Mad. 349, 356 (P.C.).
2. A.I.R. 1939 Bom. 508.
3. (1919) 36 M.L.J. 284: I.L.R. 42 Mad. 565
4. (1941) 2 M.L.J. 947.

in execution of a rent decree to the defaulter. This is so by reason of the fact that the section expressly provides for the defaulter to receive a copy of the proclamation of sale by post,—a provision which might lend support to the argument that no personal service is needed in such cases. In O. 21, r. 54, C. P. Code, there is however no provision either for personal service or service by post.

AHMAD SAYEED *v.* KANIZ ZOHRA, I.L.R. (1941) All. 278.

According to this decision a tailor is an artisan and a sewing machine "tool of an artisan" within the meaning of S. 60 (*b*) of the Code of Civil Procedure. The scope of the latter provision recently fell to be examined by the Madras High Court in *Manikyam* v. *Manikyamma*[1], where it was held that a musician is not an artisan and that musical instruments cannot be regarded as "tools of an artisan." The word 'artisan' occurs in a number of statutes, English and Indian—*see* Artisans and Labourers Dwellings Act, 31 and 32, Vic. c. 170, Artisans and Labourers Improvements Act, 38 and 39, Vic. c. 36, The Settled Land Act, 1882, S. 25 (10), The Madras Towns Improvements Act (III of 1871), The Indian Limitation Act (XV of 1877), The Madras Hereditary Village Offices Act (III of 1895), S. 3, etc.—but the term is nowhere defined. In Murray's Dictionary an artisan is stated to be "one who practises or cultivates an art—an artist." But it is stated in the Oxford English Dictionary that this meaning of the term is now obsolete and that "artisan" means "one who is employed in any of the industrial arts, a mechanic, handicraftsman, artificer." A similar definition is found in Dr. Anandale's Dictionary where an artisan is stated to be "one skilled in any art or trade, a handicraftsman, a mechanic." Webster's New International Dictionary refers to him as "one trained to manual dexterity in some mechanical art, a handicraftsman, a mechanic." Thus according to the dictionaries in modern times the term 'artisan' does not include an artist but signifies an artificer, a handicraftsman or a mechanic. The Law Dictionaries also reveal a similar conclusion. Wharton[2] equates an artisan with an artificer, while Stroud[3] expresses himself more guardedly and states that an 'artisan' is probably a synonym for 'artificer.' About the meaning of the term 'artificer' there is however no dispute. He is a person who is master of his art and whose employment consists chiefly in manual labour. In fact he is a skilled workman, one who *makes* something as distinguished from one who merely *does* something, *Morgan* v. *London General Omnibus Co.*[4] It would thus appear that an artisan is a handicraftsman or a mechanic who makes something and is not a mere manual labourer or workman. An estate agent

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1. (1941) 2 M.L.J. 671.
2. Law Lexicon, 14th Edition, p. 84.
3. Judicial Dictionary, 2nd Edition, p. 121. 4. (1884) 13 Q.B.D. 832.

will not be an artisan, In re *Lord Gerard's Settled Estate*[1]; nor a washerman, Ex parte *Poonen*[2], nor a person engaged in giving instructions in wrestling and fencing, *Pylwan Jarkan Sahib Vastath* v. *Janaka Raja Tevar*[3]. On the other hand a soap-maker will be an artisan, *Bindeshri* v. *Banshi Lal*[4]; likewise a tailor, *Vithoba* v. *Babulal*[5]. According to *Maung Tha U* v. *Maung Hla*[6], a musician is possibly engaged in a mechanical employment—though this conclusion is debatable according to *Manikyam* v. *Manikyamma*[7]—but the instruments on which he plays are certainly not his "tools", for the latter term is used only in regard to instruments used by workmen and it would be putting an unnatural meaning on the words to say that a musical instrument is the tool of an artisan. At any rate, it is difficult to see how a person engaged to drive an engine on board a steamer is an 'artisan' as seems to have been held in *Emperor* v. *Haji Shaik Mahomed Shustari*[8]. In holding that a tailor is an artisan and his sewing machine a "tool of an artisan," the decision under review takes a view which is in consonance with that held in Nagpur and not dissented from elsewhere.

NIMAR PANDEY *v.* JAGADISH PANDEY, I.L.R. (1941) All. 313.

Though the terms "refuse" and "reject" are treated as synonymous in popular parlance as well as by the dictionaries, how they can produce different repercussions in the field of law is seen from the decision under notice. In this case it has been held that where an application to sue as a pauper is dismissed for default of appearance of the applicant *after* notices had been issued to the opposite party and the Government Pleader but before the merits of the application had been considered, the order will not be tantamount to a "refusal" of the application so as to attract the bar of r. 15 of O. 33, C. P. Code, against a second application for such leave in respect of the same right to sue. O. 33, r. 15 enacts that an order *refusing* leave to the applicant to sue as a pauper will be a bar to a subsequent application of a like nature. Disposal of applications for leave to sue as a pauper may take place either under O. 33, r. 5 or under O. 33, r. 7 (3). While an order of *refusal* of leave is in terms contemplated by r. 7 (3) only, r. 5 refers to the *rejection* of an application merely. R. 5 is concerned with the stage before issue of notice to the opposite party and the application fails on a preliminary ground. R. 7 operates only where notice has gone and a day has been fixed for the examination of witnesses by either party and such examination has been made and the arguments,

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1. (1893) 3 Ch. 252, 263.
2. (1876) I.L.R. 1 Mad. 174.
3. (1875) 8 M.H.C.R. 87.
4. (1931) I.L.R. 54 All. 399.
5. A.I.R. 1923 Nag. 289.
6. (1916) 38 I.C. 414.
7. (1941) 2 M.L.J. 671.
8. (1907) I.L.R. 32 Bom. 10.

if any, on the question whether on the face of the application and of the evidence, if any, the applicant is or is not subject to any of the prohibitions specified in r. 5, have been heard. The presence of the word " then " in r. 7 (3) cannot be regarded as accidental or otiose and *prima facie* suggests that a *refusal* of the application can be made only if the inquiry has been held. On this line of reasoning it has been held in a number of cases that where an application for leave to sue *in forma pauperis* is thrown out on the ground of default of appearance on the part of the applicant, though it be *after* notice has been issued to the opposite party, the order will not be one of refusal under O. 33, r. 7 (3) and as such a fresh application for leave will not be barred by r. 15, see *Chinnammal* v. *Papathi Ammal*[1], *Krishnamoorthy* v. *Ramayya*[2], *Baliram Shukul* v. *Mt. Sitabai Shukul*[3], *Maung Aung Tun* v. *Ma E Kin*[4], *Ma Sein* v. *Ma Kya Hmyin*[5]. It is true that the last two decisions were cases where neither party was present on the date fixed for hearing the application, but they do recognise that unless there is a determination of the application on the merits, there is no refusal within the meaning of r. 7 (3) and hence no bar under r. 15. In *Rajendra Nath Paramanik* v. *Tushtamayee Dasee*[6], the Calcutta High Court has laid the test regarding applicability of bar under r. 15, on whether the rejection of the application for leave to sue as a pauper was before or after notice to the opposite party and not on whether the order was one on the merits or *de hors* the same. In an earlier case however where the application for leave to sue as a pauper was rejected (after notice had been served on the opposite party) for default of appearance by the applicant it was practically assumed that it made no difference whether the order was one of rejection under r. 5 or refusal under r. 7 for purposes of the operation of the bar under r. 15, see *Khondkar Ali Afzal* v. *Purna Chandra Tewari*[7]: see also *Atul Chandra Sen* v. *Peary Mohan Mukherjee*[8]. That an order of rejection under r. 5 will not attract the bar of r. 15 is however the view taken by other Courts, *Mt. Bal Kuar* v. *Shib Das*[9], *Ram Lakhan* v. *Kishore Lal*[10], *Baliram Shukul* v. *Mt. Sitabai Shukul*,[3] The latter view is consistent with the fact that the bar under O. 33, r. 15 appears to be that of *res judicata* whereas an order passed under r. 5 is of a summary character based on the petition or on facts apparent at the time of the presentation of the petition. That there is a difference between an order passed under r. 5 and one passed under r. 7 (3) and that it is only where an application has been heard on the merits and refused that the bar of r. 15 can apply and not where the

1. A.I.R. 1925 Mad. 986.
2. (1926) 51 M.L.J. 79: I.L.R. 50 Mad. 63.
3. A.I.R. 1935 Nag. 168.
4. A.I.R. 1924 Rang. 161.
5. (1926) I.L.R. 4 Rang. 245.
6. (1932) I.L.R. 60 Cal. 630.
7. A.I.R. 1924 Cal. 1039.
8. (1915) 20 C.W.N. 669.
9. (1919) I.L.R. 1 Lah. 151.
10. A.I.R. 1933 Oudh 534.

application fails for default of appearance of the applicant—at whatever stage it may be, seem to be the preferable view on the language of the rules. The observation of Chitty, J., in *Baroda Dasi* v. *Upendranath Mandal*[1], that the application in that case was " not a case of an application being dismissed for want of appearance" suggests a difference between dismissal based on a refusal to proceed and that based on a default of appearance, and that in the view of the learned Judge the latter will not amount to a refusal under O. 33, r. 15.

INDER BAHADUR SINGH *v.* SITA RAM, I.L.R. (1941) All. 370.

In this case it has been held that a suit by a member of a Mitakshara joint family to avoid alienations made by a former manager in favour of different individuals and at different times will not be bad for misjoinder of causes of action and parties, by reason of the relief against the various alienees being sought in the same suit. Under O. 2, r. 3, of the Code of Civil Procedure, it is open to a plaintiff to unite in the same suit several causes of action against the same defendant or defendants jointly. This rule must be read with O. 1, r. 3 according to which all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly or severally, where if separate suits were brought against such persons any common question of law or fact will arise. Thus a plaintiff can join different causes of action against different defendants if he is able to bring his case within the purview of O. 1, r. 3. The meaning of 'cause of action' was explained by Lord Watson in *Chandkuar* v. *Partab Singh*[2], where he observed : " the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour ". In the *Commissioners of Sewers of the City of London* v. *Glasse*[3], the principle is laid down by Lord Romilly, M.R., that if the plaintiff claims one and the same right under one and the same title against all the defendants, the bill will not be rendered multifarious by the fact that they may raise different defences. Thus in actions in ejectment in England by a lessee under a demise, all the persons in possession of the different portions of the property are made parties under whatever title they hold and at whatever times such titles are claimed to have accrued in their favour, see *Hodgins* v.

1. (1919) 52 I.C. 562.
2. (1888) L.R. 15 I.A. 756; I.L.R. 16 Cal. 98 (P.C.).
3. (1872) 41 L.J. Ch. 409.

Hickson[1], *Minet* v. *Johnson*[2]. In India also the same procedure is permitted in ejectment suits. In *Ishun Chunder Hazra* v. *Mondol*[3], which was a suit for the eviction of a number of persons who claimed to be in possession of the property in suit in pursuance of different purchases from one Brahmamoyi Debi —a limited owner—it was held that on her death the reversioners can bring a suit against all the alienees and claim relief in the same action and that the suit was not bad for multifariousness. The principle underlying the view was explained by Hill and Brett, JJ., in *Nundo Kumar Nasker* v. *Banomali Gayan*[4], where they stated : " The cause of action of a plaintiff suing in ejectment cannot be affected by the title under which the defendant professes to hold possession. It matters not to the plaintiff how the defendant may explain the fact that he is in possession or seek to defend his possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him and that cause gives him his cause of action. If this is so, where there is but one person in possession, can there be a difference when the land is in the possession of more than one ? We think not . . . . What he (plaintiff) is entitled to claim is the recovery of possession of the land as a whole and not in fragments and . . all persons who oppose him in the enforcement of that right are concerned in his cause of action and *ought* accordingly to be made parties to a suit in which he seeks to give effect to it." There is no reason why a suit to set aside alienations by a manager and for recovery of possession from different transferees should not be governed by the same principles. As early as *Sami Chetty* v. *Ammani Achi*[5], it was pointed out that in such cases, the cause of action, the right, is the plaintiff's relation to the family to which the property appertains and on which right if established and if not otherwise barred he will be entitled to his share wherever found and that the fact that various persons have affected to purchase different parcels of the property at different times will not destroy the unity of his ground of action. In *Vasudeva Shanbhaga* v. *Kuleadi Narnapai*[6], the same view was taken by a Full Bench which observed : " It is manifest that the number and nature of the alienations are no unimportant elements for the determination of their propriety. It is most desirable that the whole of them should be at once before the Court called upon to decide the question in order to secure the soundness of the particular decision and perhaps the avoidance of discordant decisions in different cases upon facts nearly the same." This case has been subsequently followed in Madras, see *Mahomed* v. *Krishnan*[7]. In Allahabad, though originally *Vasudeva Shambaga's case* was sought to be distinguished

1. (1878) 39 L.T. 644.
2. (1890) 63 L.T. 507.
3. (1897) I.L.R. 24 Cal. 831.
4. (1902) I.L.R. 29 Cal. 871.
5. (1873) 7 M.H.C.R. 260.
6. (1874) 7 M.H.C.R. 290 (F.B.).
7. (1887) I.L.R. 11 Mad. 106.

on the ground that in that case apparently the decision as to the rights of one person might be affected by the evidence as to the rights claimed by another alienee of the property—*see Ganeshi Lal* v. *Khairati Singh*[1]—in all later cases the Madras Full Bench view has been followed, see *Parbati Kunwar* v. *Mahamad Fatima*[2], *Kubra Jan* v. *Ram Bali*[3], *Bal Krishna Das* v. *Hira Lal Bagla*[4]. The Bombay view also does not seem to be different,see *Raghunatha* v. *Sarosh*[5], *Umabai* v. *Vithal*[6], *Dattatraya* v. *Gopal.*[7] The cause of action against the several transferees is the same as it would have been against the manager if he were alive and the suit will not therefore be bad for misjoinder of causes of action and defendants. The decision under notice also lays down that if in such a case the Court feels it desirable that there should be separate trials under O. 2, r. 6, the proper order to pass will be to ask the plaintiff to amend his plaint and to set out separately the allegations against each transferee in order that separate issues might be framed in respect of each such transaction, thus enabling the Court to try the suit in sections, but yet as part of the same proceedings.

RAJ NANDINI PURKAYASTHA *v.* ASWINI KUMAR CHAUDHURI, I.L.R. (1941) 1 Cal. 457.

The Calcutta High Court decides in this case that an adoption among Hindus will not be invalid merely because the adoptee and the adopter belong to different sub-castes. It is no doubt an ideal of Hindu law that the adopted son should be the reflection of a real son (पुत्रच्छायावहः). A text of Manu says:

माता पिता वा दद्यातां यमद्भिः पुत्रमापदि ।
सदृशं प्रीतिसंयुक्तं स ज्ञेयो दत्रिमः सुतः ॥

—that (boy) alike whom his mother or his father affectionately gives with water, in times of distress must be considered to be an adopted son[8]. The term सदृशं has been the subject of different interpretations. According to Medhatithi[9], it means " alike not by class, but by qualities suitable to the family; accordingly a Kshatriya or a person of any inferior class may be the son of a Brahman." The Kalpataru[10] has similarly stated : " a Sudra even is certainly a son ; such is the meaning." In this view, the adoption of a boy belonging to a different sub-caste will be an *a fortiori* case. Other commentators of Manu—Kulluka, Raghavanand and Nandana—have construed सदृशं as referring to a boy of the same caste. A text of Vriddha

1. (1894) I.L.R. 16 All. 279.
2. (1907) I.L.R. 29 All. 267.
3. (1908) I.L.R. 30 All. 560.
4. (1914) I.L.R. 36 All. 406.
5. (1899) I.L.R. 23 Bom. 266.
6. (1909) I.L.R. 33 Bom. 293.
7. (1931) 134 I.C. 689.
8. IX, 168.
9. Cit., in Dattaka Mimamsa, sec. 2, para 25.
10. Cit., in *ibid.*

Yagnavalkya postulates the same view and prescribes that a son of the same caste should be taken in adoption—स्वजातीयः सुतो ग्राह्यः. Saunaka also positively prohibits the adoption of a boy belonging to a different caste. He has stated: "The adoption of a son by any Brahman must be made from among *Sapindas*, or on failure of these an *asapinda*, otherwise let him not adopt ; of Kshatriyas in their own class positively . . . ; of Vaisyas from amongst those of the Vaisya class ; of Sudras from amongst those of the Sudra class ; of all and the tribes likewise (in their own) classes only and not otherwise." The Mitakshara[1], and the Mayukha[2] agree that an adoption outside the caste is not permissible. The Dattaka Mimamsa[3] and the Dattaka Chandrika[4] have expressed a like view.

Rightly or otherwise in Madras and Bengal, for a long time now, the eligibility of a boy for purposes of adoption rests upon whether the mother of the boy in her maiden state could have married the adoptive father. Judged by this test the adoption of a boy belonging to a lower caste will be permissible in places where *anuloma* marriages are recognised, though the adoption of a boy belonging to a higher caste will be void. In fact this test was applied in negativing the validity of the adoption of a Brahman boy by a Rajbansi Thakur (Kshatriya), see, *Narain Singh* v. *Mt. Shiam Kali Kunwar*[5]. If however spiritual considerations will be the proper measure of the validity of an adoption and form its background as seems to be suggested in *Amarendra Man Singh* v. *Sanatan Singh*[6], the adoption of a boy of a lower caste will be equally invalid. The same result will ensue even where a boy of a different sub-caste is adopted. In *Kusum Kumari Roy* v. *Satya Ranjan*[7], the adoption by an orthodox Hindu of an infant son of a member of the Sadharan Brahmo Samaj (the son having been born after his father had become a Brahmo) was held to be valid. If the spiritual test were to apply, the decision may require reconsideration. The opinion in *Shib Deo Misra* v. *Ram Prasad*,[8] assumes the validity of the adoption of a boy of a different sub-caste without practically any discussion. Were the spiritual rule to operate there will have to be a considerable re-fashioning of the law of adoption and particularly in the province of Bombay. It will however be a matter for consideration, the spiritual principle notwithstanding, whether the adoption of a boy of a different sub-caste will now on a rigorous application of that principle be held void in view of the opinion expressed by the Courts in Nagpur, Calcutta and Allahabad in favour of the validity of such an adoption.

1. I, IX, 9. 2. IV, 5; 9.
3. Sec. 2, para 25. 4. Sec. 1, paras 12 and 16.
5. (1914) 25 I.C. 45.
6. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.)
7. (1903) I.L.R. 30 Cal. 999. 8. (1924) I.L.R. 46 All. 637.

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* JODARAJ DHUPAJEE, (1941) 2 M.L.J. 993.

Section 9 of the Madras Land Encroachment Act (III of 1905) provides that the assessment and penalty imposed under the Act on any person in unauthorised occupation of land shall be "deemed to be land revenue" and may be recovered as arrears of land revenue under the provisions of the Madras Revenue Recovery Act, 1864. Under S. 42 of the latter enactment a sale of property on account of arrears of revenue will be free of all incumbrances. In (1940) 2 M.L.J., N.I.C., p. 37, it was pointed out how expressions like "in the same manner as arrears of land revenue," "as if it were arrears of land revenue", "as arrears of land revenue" will not *per se* imply that the property of a defaulter sold for the recovery of the demand in question will pass free of incumbrances to the purchaser, but that if the demand fell by statutory prescription to be included within the term 'public revenue' (*e.g.*, cess regarding water supplied) the position will be different. The Land Encroachment Act declares that the assessment and penalty imposed under it shall be "deemed to be land revenue". In regard to the expression "deemed to be", in *The Queen* v. *The County Council of Norfolk*,[1] Cave, J., observed: "Generally speaking when you talk of a thing being deemed to be something you do not mean to say that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be, and that notwithstanding it is not that particular thing nevertheless *for the purposes of the Act*, it is to be deemed to be that thing". See also *Leitch* v. *Emmot*.[2] Lord Dunedin's observations in *The Commissioner of Income-tax, Bombay Presidency* v. *Bombay Trust Corporation Ltd.*,[3] are also to a like effect. He said: "When a person is 'deemed to be something', the only meaning possible is that whereas he is not in reality that something, the Act of Parliament requires him to be treated *as if he were*." In other words the phrase is used to *extend* the application of a provision of law to a class not otherwise amenable to it, see *Ramabhadra Odayar* v. *Gopalaswami Odayar*.[4] Thus the assessment and penalty leviable under the Land Encroachment Act are to be treated as land revenue with all consequences attendant on their recovery and hence the conclusion becomes easy that a sale for realisation of the same would pass the property sold free of incumbrances to the purchaser.

ABDUL RAHAMAN *v.* BALAI PADA SET, I.L.R. (1941) 1 Cal. 137.

This case deals with a question concerning the scope of the bar contained in O. 22, r. 9 of the Civil Procedure Code. It declares that where during the pendency of a suit instituted by a

1. (1891) 60 L.J., Q.B. 379.
2. (1929) 2 K.B. 236.
3. (1929) 58 M.L.J. 197: I.L.R. 54 Bom. 216, 223: L.R. 57 I.A. 49 (P.C.).
4. (1930) 59 M.L.J. 782.

widow on a mortgage executed in her deceased husband's favour, the widow dies, the next reversioner should seek substitution in her place within the period allowed by law and that failure to do so will bar a fresh suit on the mortgage. A suit may abate either because the right to sue does not survive or because even if it survives the legal representative has not been brought on record within the prescribed time. The former arises under the general law and the latter under O. 22 of the Code of Civil Procedure. Naturally where the right to sue does not survive O. 22 has no application. In the case of a suit by a Hindu widow, whether the right to sue survives depends upon the character in which she brings the suit. If it was not for the establishment of any right personal to the widow but as representing her husband's estate, the right to sue will survive. It is well settled that though a Hindu widow takes only a qualified interest in her husband's estate she fully represents that estate and the succeeding heirs would be bound by a decree fairly and properly obtained against her, *Katama Nachiar* v. *Raja of Shivagunga*.[1] Since the right to sue survives, where she sues as representing the estate the question will be whether the reversioners could be deemed to be her legal representatives for continuing the action on her death. No doubt under the English law the primary meaning of the term "legal representative" is "executor or administrator"—see *Price* v. *Strange*[2]—but the definition in S. 2 (11) of the C. P. Code is admittedly wider. As stated by Mitra, J., in *Amar Chandra Kundu* v. *Sebak Chand Choudhury*[3]: "The expression 'legal representative' as used in the Code of Civil Procedure is not confined to the heir, executor or administrator of a deceased person. It has been held to include a person, who though not as heir, executor or administrator holds an estate in other capacities, such as a son adopted by a widow in relation to the widow or a reversioner taking an estate after the death of a widow or daughter in possession as an heiress if the debt covered by the decree against the widow or daughter was incurred for the necessary purposes of the estate held by her." It has, however, been suggested—see *Lachhman* v. *Bansi*[4]—that the bar of O. 22, r. 9 can operate on failure by the legal representatives to get themselves substituted in the place of the deceased only where "the *deceased's* right to sue survives" and not otherwise. The distinction between a case where a "deceased's right to sue survives" and a case where "the right to sue survives" is with great respect not to be found in the C. P. Code. The language of O. 22 is general and r. 1 speaks only of the survival of the right to sue. If a plaintiff dies he cannot possess any right and the surviving right is in no sense the deceased's right to sue. What survives is the right of suit and it attaches

1. (1863) 9 Moo.I.A. 539.
2. (1820) 6 Maddison 159.
3. (1907) I.L.R. 34 Cal. 642.
4. (1930) I.L.R. 12 Lah. 275.

to the person who becomes in law entitled to enforce the claim on which the suit is based. Hence where the deceased had sued in a representative character the right passes to the person who in law would represent the estate. In *Venkatanarayana Pillai* v. *Subbammal*,[1] in allowing the substitution of one reversioner in place of another who died pending a suit instituted by him for a declaration of the invalidity of certain alienations by a widow, the Privy Council remarked: "The phraseology of sub-S. 11 (of S. 2, C. P. Code) in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing in his reversionary right the estate of the last male owner; and that on his death such right devolved on the petitioner. Their Lordships added: "If the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's action, it follows that on his death the 'next presumable reversioner' is entitled to *continue the suit* begun by him. Their Lordships are of opinion that in this case the right to sue survives and that the petitioner is clearly entitled to the order asked for." It is true that the Privy Council allowed the substitution on the ground that the reversioner concerned could have been a co-plaintiff in the action under O. 1, r. 1, but the decision leaves no room for doubt that the petitioner would be entitled to substitution also on the ground that the right to sue survived. Hence on the death pending the suit of a limited owner who had sued as representing the estate of the full owner the nearest reversioner should get himself substituted. In *Prenmoyi Choudhrani* v. *Preonath Dhur*,[2] it was thus remarked: "Ishwari Dassi did not bring the suit on any cause of action personal to herself only. She sued as representing her husband's estate; and the property, if recovered, would continue to appertain to that estate, and would on her death, go with the rest of it to the succeeding heirs. These heirs, although they do not claim through her are . . . . for the purposes of the suit her legal representatives . . . and if the right to sue survives as we think it undoubtedly does survive, they are the only persons who can proceed with the suit." This line of reasoning has been adopted in almost all subsequent cases, see *Ramaswami* v. *Pedamunayya*,[3] *Jadubansi Kunwar* v. *Mahpal Singh*.[4] The view in the instant decision is in accord with these authorities and the contrary opinion to be found in *Lachhman* v. *Bansi*[5] finds little support either in the code or under the authorities. In fact, in the last mentioned case Bhide, J., himself recognises: "There is no doubt that a suit of this type is of a representative character, but the question whether an abatement binds all reversioners in such a case is not free from difficulty." He was however against applying the bar of O. 22, r. 9 on the ground "that the aforesaid rule

1. (1913) 28 M.L.J. 535: I.L.R. 38 Mad. 406: L.R. 42 I.A. 125 (P.C.).
2. (1896) I.L.R. 23 Cal. 636.
3. (1914) I.L.R. 39 Mad. 382.
4. (1915) I.L.R. 38 All. 111.
5. (1930) I.L.R. 12 Lah. 275.

being a disabling one should be strictly construed." The other reason that O. 22 is really confined to the question of the continuance of the suit by virtue of the devolution of the *deceased's* right to sue on other persons during the pendency of the suit has as already stated no basis in the Code.

Amulya Mohan Basak *v.* Moinuddin, I.L.R. (1941) 1 Cal. 318.

This case deals with an interesting question of insolvency law which seems to be more or less a matter of first impression. It holds that where a debtor applying to be adjudicated as insolvent satisfies the conditions laid down in that behalf by the Presidency Towns Insolvency Act, he is entitled to an order of adjudication notwithstanding that that person is a disqualified proprietor and his estate is under the superintendence of the Court of Wards. S. 11 of the Presidency Towns Insolvency Act specifies the restrictions on the jurisdiction of the Court to make an order of adjudication and S. 14 states the conditions on which a debtor may present an insolvency petition. There is nothing in the sections to suggest the exclusion of a debtor who is a ward of Court from seeking the benefits of the Act. Adjudication being a matter involving a change of status, the primary condition that should be satisfied by every debtor applying to be adjudged insolvent is that he should have the *capacity* to commit the act of insolvency. Where the capacity exists, the right to an order of adjudication on the conditions prescribed by S. 14 being present is a statutory right and not a matter resting on the Court's discretion, *Chhatrapat Singh Dugar* v. *Kharag Singh*.[1] The order shall then be available as a matter of course, *Re*: *Gopaldas Aurora*.[2]

It is true that the purposes of the Insolvency Acts which are enactments of the Central Legislature are wider than those of the Court of Wards Acts in the different provinces which are matters of provincial legislation only, and the provisions of the former are in a general sense paramount. Also to equate a disqualified proprietor with a minor or a lunatic in regard to his legal capacity may not be justifiable, *The Raja of Vizianagaram* v. *The Secretary of State for India in Council*.[3] The question will really be how far a disqualified proprietor becomes legally incapacitated. Section 6 of the Bengal Court of Wards Act declares the disqualification to be to "manage" his property. Section 7 authorises the Court of Wards to take charge of all the properties of the person. Section 10 (*c*) enjoins a bar against the execution of any decree or order against the person or property of the ward subject to certain conditions; *see also* S. 64-A. Section 51 recognises the capacity of a ward to institute suits subject to certain formalities being complied with and S. 60 lays down that a ward cannot create without the sanction of the

1. (1916) 32 M.L.J. 1: I.L.R. 44 Cal. 535: L.R. 44 I.A. 11 (P.C.).
2. (1925) 30 C.W.N. 173.
3. (1936) 71 M.L.J. 873.

Court of Wards any charge upon or interest in his property. The corresponding provision in the Madras Act, S. 34 (1) (*a*), is somewhat wider and declares that "a ward shall not be competent to transfer or create any charge on or interest in any part of his property or to enter into any contract or to make any acknowledgment involving him in pecuniary liability personally or in respect of such property. Dealing with the extent of the incapacity of a ward under the Oudh Land Revenue Act of 1876, the Privy Council said: "From a perusal of the group of sections above referred to, their Lordships are of opinion, that it was not intended to interfere with the personal status or rights of an adult disqualified proprietor who is neither idiot nor lunatic, except as regards the management of his property or anything expressly prohibited," *Dhanipal Das* v. *Maneshar Baksh Singh.*[1] A disqualified proprietor will not thus be under any disability regarding property of which he is a trustee, *Sri Thakurji* v. *Hira Lal.*[2] Where a ward is a hereditary trustee, then under the Madras Court of Wards Act it will be for the Court of Wards to arrange for the discharge of the ward's duties as trustee, *see* S. 63 of Madras Act I of 1902. A disqualified proprietor is not precluded from entering into a contract of marriage but no adoption by him will be valid except when made with the consent of the Provincial Government—*see* S. 61 of the Bengal Act. The language of the corresponding section in Madras, S. 34, cl. (*c*) is: "a ward shall not be competent to adopt except with the consent of the Court of Wards", with a rider that the Court shall not withhold its consent except for certain reasons. This has been construed to mean that consent to an adoption is not to be ordinarily refused, see *The Raja of Vizianagaram* v. *The Secretary of State for India in Council.*[3] In the Bengal Act there is seemingly nothing to suggest that the consent of the Provincial Government is not to be ordinarily withheld. But the provision permitting the obtaining of such consent *ex post facto* shows that permission would be accorded normally; otherwise the repercussions will be serious as adoption affects status. If the conclusion is right that the capacity to adopt is not destroyed by a person becoming a ward of Court, it will follow that the disqualification operates only to 'managing' the property or dealing with the property directly. Adoption is the appointment of an heir to one's property in the ultimate analysis, and if property can be affected by the operation of law consequent on adoption it should be equally unobjectionable if property with the Court of Wards gets indirectly affected by any other act of the disqualified pro-

1. (1906) 16 M.L.J. 292 : L.R. 33 I.A. 118 : I.L.R. 28 All. 570, 580 (P.C.).
2. (1922) I.L.R. 44 All. 634.
3. (1936) 71 M.L.J. 873.

prietor; such as the filing of an insolvency petition. It would thus appear that the view propounded in the instant decision is in no way against the policy of the Bengal Court of Wards Act. Whether a similar conclusion will be justified under the Madras Act is doubtful having regard to the language of S. 34 (*a*) which prohibits a ward from entering into any contract or making any acknowledgment involving him in a pecuniary liability. Signing a schedule in insolvency proceedings is to make such acknowledgment and hence it looks as if under the Madras Act a disqualified proprietor cannot file an application for being adjudicated insolvent.

AKINA BIBI *v.* MUHAMMAD ALI SHAHA, I.L.R. (1941) 1 Cal. 405.

An important question of practice, namely, whether a decree involving fraud upon the Court can be vacated on application under S. 151 of the Code of Civil Procedure, which ordinarily will not apply when there is another remedy available, was answered in the affirmative in this case. A suit for partition had been brought resulting in a decree on the basis of a *solenama* purporting to settle the matter amicably. Later on, an application was preferred to the trial Court to set aside the decree on the allegation, that the suit had been instituted with the petitioner and certain others as plaintiffs without their knowledge, that the *solenama* was also false and without their knowledge and that the decree had been fraudulently procured. Under the English practice, according to Lord Cottenham, where an impeached decree is so very defective that the Court treats it as a nullity it may *possibly* be got rid of by *motion*, see *Morrison* v. *Morrison*.[1] In *Flower* v. *Lloyd*,[2] after a final judgment had been obtained in the Court of Appeal dismissing an action with costs, the plaintiff sought by motion in that Court for leave for a rehearing of the appeal on the ground of subsequent discovery of facts showing that the order of the Court of Appeal had been obtained by a fraud practised on the Court below. In refusing leave Jessel, M.R., stated: "If there were no other remedy I should be disposed to think that the relief now asked ought to be granted, for I should be slow to believe that there were no means whatever of rectifying such a miscarriage if it took place; but I am satisfied that there is another remedy." The principle of that case has been held to be equally applicable in India and that it is only by a suit brought for that purpose or by way of a review that the decree should be vacated—see *Mirali Rahimbhoy* v. *Rahimbhoy Habibbhoy*,[3] *Fatmabai* v. *Sonbai*.[4] In the latter

1. (1833) 4 M. & C. 215.
2. (1877) 6 Ch.D. 297.
3. (1891) I.L.R. 15 Bom. 594.
4. (1911) I.L.R. 36 Bom. 77.

case it was stated: "A consent decree once duly obtained cannot be set aside by a rule, but if it is sought to impeach it upon grounds of fraud, that must be done in a regular suit. The only alternative which the law allows is an application for review of "judgment". The fraud alleged in that case was a fraud on the Court, namely, that the warrant authorising the Attorney to defend the suit on behalf of the third defendant was forged. In the instant decision Henderson, J., remarked: "If the matter was *res integra,* I should find it very difficult to hold that these cases ought to be an exception to the general rule. The remedy by suit....remains, and in my judgment, it is the most appropriate remedy. In all these cases it is an important question of fact if fraud has been committed or not, and a suit provides the most satisfactory procedure for investigating such facts". There were however decisions of the Calcutta High Court holding that a decree obtained by fraud on the Court can be set aside on application under S. 151, Code of Civil Procedure—see *Peary Chowdhury* v. *Sonoo Dass,*[1] *Suresh Chandra Sen* v. *Jogesh Chandra Sen.*[2] The same view had been taken in Patna—see *Sadho Saran Rai* v. *Anant Rai,*[3] *Sheodhar Prasad Singh* v. *Ramdeo Prasad Singh;*[4] in Madras—see *Vilakathala Raman* v. *Vayalil Pachu;*[5] and in some decisions of the Bombay High Court, *Basangowda* v. *Churchigirigowda.*[6] In the Bombay case remedy through an application was held available apart from any provision of the Civil Procedure Code. The Court observed: "The result has been that there has been fraud committed upon the Court. The Court was persuaded to sign a decree to which the defendant had never consented and that upon the representation that he had consented to it. Therefore once the Court is asked to go back upon its own procedure, it is not a question whether there is any section in the Civil Procedure Code to warrant the action of the Court amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled".

In view of the English practice being different and the absence of uniformity in judicial opinion in India, an authoritative pronouncement by the Judcial Committee on this matter will be desirable.

SUBODH CHANDRA NAG *v.* K. L. BANK, LTD., I.L.R. (1941) 1 Cal. 429.

It is held in this case that in a suit to enforce a simple mortgage the equity of redemption is not to be regarded as the

1. (1914) 19 C.W.N. 419.
2. (1939) 43 C.W.N. 969.
3. (1923) I.L.R. 2 Pat. 731.
4. (1933) I.L.R. 13 Pat. 165.
5. (1914) 27 M.L.J. 172.
6. (1910) I.L.R. 34 Bom. 408.

subject-matter of the suit and that when a decree results in such a suit the defendant cannot file an appeal as a pauper under O. 44, r. 1 of the Code of Civil Procedure unless the value of the equity of redemption is set out and taken into consideration. In a simple mortgage the mortgagor is in possession and enjoyment of the mortgaged property and the equity of redemption is certainly worth something. Even where a suit is one for redemption by the mortgagor the Allahabad High Court has held in *Kapildeo Singh* v. *Ram Rikha Singh*,[1] that the plaintiff cannot ask for leave to sue *in forma pauperis* so long as he can raise money on the equity of redemption. This view has been dissented from in Madras and it has been held that the equity of redemption is itself the subject-matter in suit in such cases, *Sekharan* v. *Eacharan*.[2] In *Manicka Chetty* v. *Narayanaswami Naidu*,[3] it was stated that there can be no doubt that the subject-matter of a mortgagor's suit for redemption is his right to redeem or his equity of redemption and therefore its value should be excluded in determining whether its owner is a pauper. In Nagpur and Lahore the view is held that the Allahabad ruling cannot apply where the mortgagor is not in possession of the property, *see Chunni Lal* v. *Gulzari Lal*,[4] *Baston* v. *Nawab of Bahawalpur*.[5] Whatever may be the position in regard to a suit for redemption, the case of a suit to enforce a simple mortgage stands on a different footing. The equity of redemption is only indirectly involved. It is possible that in execution of the decree for sale the property might be lost to the mortgagor. This however is not an inevitable consequence but depends on the act or default of the mortgagor in the matter of satisfying the decree. In *Durga Prasad* v. *Srinivas*,[6] where the facts were similar to those in the decision under review, the Patna High Court held that the value of the equity of redemption cannot be excluded by the Court in considering the application by the defendant for leave to appeal *in forma pauperis*, and that the value thereof should therefore be stated. The decision under notice has followed this view.

[END OF VOLUME, 1941—II.]

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1. (1910) I.L.R. 33 All. 237.
2. (1910) 3 I.C. 459.
3. (1933) 65 M.L.J. 277 : I.L.R. 57 Mad. 82.
4. A.I.R. 1924 Nag. 44.
5. A.I.R. 1933 Lah. 528.
6. A.I.R. 1930 Pat. 368.